Supreme Court, U.S.
FILED

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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

Richard Ackerman, Timothy Booker, Erich Butler, Michael Dickson, Edward Donahoe, Michael Fabian, Steven Jones, Mark Mares, Robert Moon, James Mueller, Dana Roe, Kim Smith, Paul Spielman, Alan Tamondong, and Brad Velliquette, individually.

Petitioners,

v.

Coca-Cola Enterprises, Inc., a Delaware Corporation in good standing and licensed to do business in Colorado,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

The Tenth Circuit Court of Appeal's ruling that Petitioners were exempt from the Fair Labor Standards Act under the "outside salesman" exemption guts the intent and spirit of the Fair Labor Standards Act and the regulations interpreting the Act. Petitioners present the following questions for consideration:

1. **Whether 65% of an employee's duties can be incidental to, and in conjunction with, his primary job responsibilities thereby exempting him from the overtime requirements of the Fair Labor Standards Act.**

2. **Whether the Tenth Circuit's interpretation of the Department of Labor's regulations rendered the regulations arbitrary, capricious or manifestly contrary to the intent of the Fair Labor Standards Act.**

3. **Whether the Respondent met it's burden of proof demonstrating that the Petitioners are exempt from the overtime requirements of the Fair Labor Standards Act.**

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is reported at 179 F. 3d 1260 (10th Cir. 1999). A copy of the Opinion is attached in the Appendix at Appendix A. The following judgements were appealed to the United States Court of Appeals for the Tenth Circuit by the Respondent: Memorandum Opinion and Judgement of January 27, 1997 and Memorandum Opinion and Judgement of June 23, 1997. A copy of the District Court Opinions and Judgements are also attached in the Appendix at Appendix B. A copy of the United States Court of Appeals for the Tenth Circuit Order filed August 3, 1999 is attached as Exhibit C.

JURISDICTION

The United States Court of Appeals for the Tenth Circuit issued its opinion on June 10, 1999. On June 25, 1999, Appellees file a Motion for Reconsideration. This Motion was denied on August 3, 1999. This Petition for Writ of Certiorari is filed timely and is within ninety (90) days of the Tenth Circuit's opinion. This Court's jurisdiction is invoked pursuant to 29 U.S.C. §201 et. seq. since this is a Federal Question.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Short title
29 U.S.C. §201 et. seq.

This Act may be cited as the "Fair Labor Standards Act of 1938."

Congressional finding and declaration of policy
29 U.S.C. §202(a)

(a) The Congress hereby finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce. That Congress further finds that the employment of persons in domestic service in households affects commerce.

Exemptions
29 U.S.C. §213(a)(1)

(a) Minimum wage and maximum hour requirements.

The provisions of sections 6 (except section 6(d) in the case of paragraph (1) of this subsection) and 7 [29 USCS §§ 206, 207] shall not apply with respect to–

(1) any employee employed in a bona fide executive, administrative, or professional capacity (including any employee employed in the capacity of academic administrative personnel or teacher in elementary or secondary schools), or in the capacity of outside salesman (as such terms are defined and delimited from time to time by regulations of the Secretary, subject to the provisions of the Administrative Procedure Act except than [that] an employee of a retail or service establishment shall not be excluded from the definition of employee employed in a bona fide executive or administrative capacity because of the number of hours in his workweek which he devotes to activities not directly or closely related to the performance of executive or administrative activities, if less than 40 per centum of his hours worked in the workweek are devoted to such activities).

Outside Salesman
29 C.F.R. §541.5

The term employee * * * in the capacity of outside salesman in section 13(a)(1) of the Act shall mean any employee:

(a) Who is employed for the purpose of and who is customarily and regularly engaged away from his employer's place or places of business in:

(1) Making sales within the meaning of section 3(k) of

the Act, or

(2) Obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer; and

(b) Whose hours of work of a nature other than that described in paragraph (a)(1) or (2) of this section do not exceed 20 percent of the hours worked in the workweek by nonexempt employees of the employer: Provided, that work performed incidental to and in conjunction with the employee's own outside sales or solicitations, including incidental deliveries and collections, shall not be regarded as nonexempt work.

Incidental to and in conjunction with sales work.
29 C.F.R. §541.503

Work performed "incidental to and in conjunction with the employee's own outside sales or solicitation" includes not only incidental deliveries and collections which are specifically mentioned in 541.5(b), but also any other work performed by the employee in furthering his own sales efforts. Work performed incidental to and in conjunction with the employee's own outside sales or solicitations would include, among other things, the writing of his sales reports, the revision of his own catalog, the planning of his itinerary and attendance at sales conferences.

Promotion Work
29 C.F.R. §541.504

(a) Promotion work is one type of activity often performed by persons who make sales, which may or may not be

exempt work, depending upon the circumstances under which it is performed. Promotion men are not exempt as "outside salesmen." (This discussion relates solely to the exemption under 541.5, dealing with outside salesmen. Promotion men who receive the required salary and otherwise qualify may be exempt as administrative employees.) However, any promotional work which is actually performed incidental to and in conjunction with an employee's own outside sales or solicitations is clearly exempt work. On the other hand, promotional work which is incidental to sales made, or to be made, by someone else cannot be considered as exempt work. Many persons are engaged in certain combinations of sales and promotional work or in certain types of promotional work having some of the characteristics of sales work while lacking others. The types of work involved include activities in borderline areas in which it is difficult to determine whether the work is sales or promotional. Where the work is promotional in nature it is sometimes difficult to determine whether it is incidental to the employee's own sales work.

(b)(1) Typically, the problems presented involve distribution through jobbers (who employ their own salesmen) or through central warehouses of chainstore organizations or cooperative retail buying associations. A manufacturer's representative in such cases visits the retailer, either alone or accompanied by the jobber's salesman. In some instances the manufacturer's representative may sell directly to the retailer; in others, he may urge the retailer to buy from the jobber.

(2) This manufacturer's representative may perform various types of promotional activities such as putting up displays and posters, removing damaged or spoiled stock from

the merchant's shelves or rearranging the merchandise. Such persons can be considered salesmen only if they are actually employed for the purpose of and are engaged in making sales or contracts. To the extent that they are engaged in promotional activities designed to stimulate sales which will be made by someone else the work must be considered nonexempt. With such variations in the methods of selling and promoting sales each case must be decided upon its facts. In borderline cases the test is whether the person is actually engaged in activities directed toward the consummation of his own sales, at least to the extent of obtaining a commitment to buy from the person to whom he is selling. If his efforts are directed toward stimulating the sales of his company generally rather than the consummation of his own specific sales his activities are not exempt. Incidental promotional activities may be tested by whether they are "performed incidental to and in conjunction with the employee's own outside sales or solicitations" or whether they are incidental to sales which will be made by someone else.

(c)(1) A few illustrations of typical situations will be of assistance in determining whether a particular type of work is exempt or nonexempt under 541.5. One situation involves a manufacturer's representative who visits the retailer for the purpose of obtaining orders for his employer's product, but transmits any orders he obtains to the local jobber to be filled. In such a case the employee is performing sales work regardless of the fact that the order is filled by the jobber rather than directly by his own employer. The sale in this instance has been "consummated" in the sense that the salesman has obtained a commitment from the customer.

(2) Another typical situation involves facts similar to

those described in the preceding illustration with the difference that the jobber's salesman accompanies the representative of the company whose product is being sold. The order in this instance is taken by the jobber's salesman after the manufacturer's representative has done the preliminary work which may include arranging the stock, putting up a display or poster, and talking to the retailer for the purpose of getting him to place the order for the product with the jobber's salesman. In this instance the sale is consummated by the jobber's salesman. The work performed by the manufacturer's representative is not incidental to sales made by himself and is not exempt work. Moreover, even if in a particular instance the sale is consummated by the manufacturer's representative it is necessary to examine the nature of the work performed by the representative to determine whether his promotional activities are directed toward paving the way for his own present and future sales, or whether they are intended to stimulate the present and future sales of the jobber's salesman. If his work is related to his own sales it would be considered exempt work, while if it is directed toward stimulating sales by the jobber's representative it must be considered nonexempt work.

(3) Another type of situation involves representatives employed by utility companies engaged in furnishing gas or electricity to consumers. In a sense these representatives are employed for the purpose of "selling" the consumer an increased volume of the product of the utility. This "selling" is accomplished indirectly by persuading the consumer to purchase appliances which will result in a greater use of gas or electricity. Different methods are used by various companies. In some instances the utility representative after persuading the consumer to install a particular appliance may actually take the order for

the appliance which is delivered from stock by his employer, or he may forward the order to an appliance dealer who then delivers it. In such cases the sales activity would be exempt, since it is directed at the consummation of a specific sale by the utility representative, the employer actually making the delivery in the one case, while in the other the sale is consummated in the sense that the representative obtains an order or commitment from the customer. In another type of situation the utility representative persuades the consumer to buy the appliance and he may even accompany the consumer to an appliance store where the retailer shows the appliance and takes the order. In such instances the utility representative is not an outside salesman since he does not consummate the sale or direct his efforts toward making the sale himself. Similarly, the utility representative is not exempt as an outside salesman if he merely persuades the consumer to purchase an appliance and the consumer then goes to an appliance dealer and places his order.

(4) Still another type of situation involves the company representative who visits chainstores, arranges the merchandise on shelves, replenishes stock by replacing old with new merchandise, consults with the manager as to the requirements of the store, fills out a requisition for the quantity wanted and leaves it with the store manager to be transmitted to the central warehouse of the chainstore company which later ships the quantity requested. The arrangement of merchandise on the shelves or the replenishing of stock is not exempt work unless it is incidental to and in conjunction with the employee's own outside sales. Since the manufacturer's representative in this instance does not consummate the sale nor direct his efforts toward the consummation of a sale (the store manager often has no authority to buy) this work must be counted as nonexempt.

Driver salesmen.
29 C.F.R. §541.505

(a) Where drivers who deliver to an employer's customers the products distributed by the employer also perform functions concerned with the selling of such products, and questions arise as to whether such an employee is employed in the capacity of outside salesman, all the facts bearing on the content of the job as a whole must be scrutinized to determine whether such an employee is really employed for the purpose of making sales rather than for the service and delivery duties which he performs and, if so, whether he is customarily and regularly engaged in making sales and his performance of nonexempt work is sufficiently limited to come within the tolerance permitted by 541.5. The employee may qualify as an employee employed in the capacity of outside salesman if, and only if, the facts clearly indicate that he is employed for the purpose of making sales and that he is customarily and regularly engaged in such activity within the meaning of the act and this part. As in the case of outside salesmen whose jobs do not involve delivery of products to customers, the employee's chief duty or primary function must be the making of sales or the taking of orders if he is to qualify under the definition in 541.5. He must be a salesman by occupation. If he is, all work that he performs which is actually incidental to and in conjunction with his own sales effort is exempt work. All other work of such an employee is nonexempt work. A determination of an employee's chief duty or primary function must be made in terms of the basic character of the job as a whole. All of the duties performed by an employee must be considered. The time devoted to the various duties is an important, but not necessarily controlling, element.

STATEMENT OF CASE

The majority of the facts in this case are undisputed. Petitioners were employed by the Respondent as salesmen. They were hired to perform sales activities. However, in the course of performing their sales activities, Petitioners were required to perform the "non-exempt" work of "non-exempt" employees. Respondent stipulated at trial that Petitioners engaged in non-exempt work in excess of twenty percent (20%) of Petitioners' work week. In fact, it was undisputed at trial that the Petitioners spent up to sixty-five percent (65%) of their time performing non-exempt work.

The Fair Labor Standards Act (FLSA) was enacted so that "labor conditions detrimental to the maintenance of the minimum standard of living necessary for the health, efficiency, and general well-being of workers" would be protected. 29 U.S.C. §202(a). To that end, the FLSA provides that employees performing "non-exempt" tasks are entitled to overtime compensation. The Respondent has failed to comply with the Fair Labor Standard Act by refusing to compensate Petitioners for the overtime compensation even though Petitioners spent up to sixty-five (65%) of their time performing non-exempt work. If the Tenth Circuit's ruling is upheld, employers can force employees to perform non-exempt work up to ninety-nine percent (99%) of the time and still claim the work is "incidental to, and in conjunction with" their sales and avoid paying overtime. In addition, the Tenth Circuit interpretation of the Department of Labor's regulations rendered the regulations arbitrary, capricious or manifestly contrary to the intent of the Fair Labor Standards Act.

The Fair Labor Standards Act also requires employers to demonstrate that an employee is exempt from the overtime compensation requirements by "plain and unmistakable evidence." The Tenth Circuit did not hold Respondents to this burden of proof.

In October of 1996, the United States District Court for the District of Colorado heard this case. On January 27, 1997, the District Court entered a judgment for the Petitioners finding that Petitioners activities were not exempt under the FLSA and that Petitioners were entitled to overtime compensation.

Appellants filed an appeal before the Tenth Circuit Court of Appeals on February 26, 1997 and filed an Amended Notice of Appeal on June 27, 1997. On June 10, 1999, the Tenth Circuit reversed the District Court's decision. In its decision, the Tenth Circuit concluded that Petitioners "non-exempt" activities were "incidental to and in conjunction with" their sales activities, and thus, Petitioners were not entitled to overtime compensation. Petitioners' request for rehearing was denied on June 25, 1999.

ARGUMENT FOR GRANTING WRIT

The Tenth Circuit's ruling allows employers to require employees, who are exempt from the Fair Labor Standards Act, to perform non-exempt work in excess of forty hours per week without having to pay that employee overtime. Employers can now hire "sales" employees, who are ostensibly exempt from the Fair Labor Standards Act, and require them to perform non-exempt work for as much as ninety-nine percent (99%) of their time, and avoid paying them overtime, so long as the employee

is the one who closes the sale.

The Tenth Circuit's decision renders meaningless and void the terms "incidental and in conjunction with" as set forth in the Department of Labor's regulations. This interpretation is contrary to the spirit and intent of the Fair Labor Standards Act and renders the regulations arbitrary, capricious or manifestly contrary to the intent of the Fair Labor Standards Act.

In addition, the Supreme Court of the United States has not ruled on this issue, and thus the Tenth Circuit's decision allows employers to manipulate employee's work activities to avoid paying overtime.

ARGUMENT I

"Forty-six hours per week of an employees duties can not be incidental to, and in conjunction with," his primary job responsibilities thereby exempting him from the overtime requirements of the Fair Labor Standards Act.

The Fair Labor Standards Act requires employers to pay employees overtime for any hours worked in excess of forty hours per week. It does, however, provide for several narrow exceptions. Under the "outside salesmen" exception, an employer is not required to pay overtime if the employer can meet a two part test. 29 C.F.R. §541.5.

First, the employee's primary responsibility must be to engage in sales away from the employers normal place of business. Petitioners acknowledge that this element has been satisfied. Second, Respondent must prove by plain and

unmistakable evidence that the salesman spent less than twenty percent of the time non-exempt employees spent performing non-exempt work. 29 C.F.R. §541.5(b). Time spent performing work "incidental to and in conjunction with" the employees sales responsibilities does not count toward the twenty percent threshold. 29 C.F.R. § 541.5(b)

Respondent also hired "merchandisers" who were non-exempt employees to perform a variety of tasks associated with the distribution and promotion of Respondent's product.[1] Respondent also required the Petitioners to perform these same merchandising tasks. As noted by the Court of Appeals, Respondent required the Petitioners to work up to seventy-two hours a week, **(App. A at 4)**, and the District Court found at trial that the Petitioners would spend up to sixty-five percent of that time, **(App. B at 7, FN 5)** or over forty six hours a week, performing these same merchandising tasks.

Respondent acknowledges that merchandisers must be paid overtime to perform merchandising activities but claims that the Respondent can avoid paying overtime by requiring the salesmen to perform the same tasks. Respondent asserts that merchandising tasks are merely "incidental to and in conjunction with" the sales responsibilities when performed by a salesman while admitting that they are the primary responsibility of the

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1 The non-exempt work performed by merchandisers included restocking shelves, replacing damaged product, filling coolers, filling vending machines, delivering products and equipment, adjusting and cleaning display shelves, setting up displays, rotating product, hanging signs, cleaning the warehouse, cleaning coolers and shelves, restocking pallets, and transferring product from one store to another.

merchandisers.

Section 541.5(b) states that "work performed incidental to and in conjunction with the employee's own outside sales or solicitations, including incidental deliveries and collections, shall not be regarded as nonexempt work." 29 C.F.R. §541.503 interprets §541.5(b) to mean that work performed incidental to and in conjunction with the employee's own outside sales includes "not only incidental deliveries and collections which are specifically mentioned in §541.5(b)" but also "the writing of his sales reports, the revision of his own catalog, the planning of his itinerary and attendance at sales conferences." Clearly, these regulations recognize that the character of the work is an important factor in evaluating whether the activities are "incidental to and in conjunction with" their sales activities. In fact, C.F.R. §541.504(c)(2) specifically states that the activity must be related to promoting his own sales in order to be "incidental to and in conjunction with" his sales activities.

The Petitioners have not included the "incidental" activities cited in the regulations when calculating the twenty percent threshold. The "merchandising" activities stipulated to by the parties, and performed by the salesmen, go well beyond the examples cited in the regulations and are not related to their sales activities.

The Tenth Circuit, when considering this issue as it was presented on appeal, focused exclusively on whether the "salesman" executed the sale and ignored his overall job responsibilities. The Tenth Circuit concluded that, if the salesman took an order, every other job responsibility was related to performing a sales function regardless of the amount

of time spent performing the non-sales related functions.

The Tenth Circuits emphasis on "taking the order" is not supported by the regulations. The regulations in fact emphasize that a "determination of an employee's chief duty or primary function must be made in terms of the basic character of the job as a whole" and that "the time devoted to the various duties is an important, but not necessarily a controlling, element." 29 C.F.R. § 541.505(a).

The Tenth Circuit's ruling reaches an anomalist result. When merchandising tasks are performed by Merchandisers one hundred percent of the time, those tasks are non-exempt work. When, however, those same tasks are performed by employees such as the Petitioners over forty-six hours per week, those tasks are "exempt" work. By allowing Petitioners to be exempt from the Fair Labor Standards Act, employers can simply avoid paying overtime wages by having salaried employees with a different job title perform the same work.

Petitioners contend that this result is not what is contemplated by the FLSA or by the Secretary's regulations and interpretive guidelines. Indeed, to construe the provisions of the FLSA and the Secretary's regulations and guidelines in the manner which the Tenth Circuit did would be to utterly defeat the purpose for which the FLSA was enacted by Congress.

Curiously absent from the Tenth Circuit's Opinion, is a reference to any case from the Supreme Court of the United States interpreting the outside salesman exemption or any U.S. District Court or other U.S. Court of Appeals defining what is "incidental to and in conjunction with" sales related activities.

The Tenth Circuit has relied almost exclusively on the interpretive regulations.

When the Petitioners job responsibilities are viewed as a whole, it clear that up to sixty-five percent of their time, and up to forty-six hours per week, is not "incidental to and in conjunction with" their job responsibilities. In this instance, the non-exempt work has in fact become one of their primary responsibilities. Therefore, pursuant to the purposes of the FSLA, the interpretive guidelines and established case law, Petitioners are not exempt from the overtime requirements of the FLSA.

ARGUMENT 2

The Tenth Circuit's interpretation of the Department of Labor's regulations rendered the regulations arbitrary, capricious or manifestly contrary to the intent of the Fair Labor Standards Act.

The Tenth Circuit's opinion renders the "outside salesmen" exemption to the Fair Labor Standards Act meaningless. The exemption scheme is not intended to allow employers to manipulate the distinction between exempt and non-exempt employees by assigning non-exempt duties to exempt employees to avoid paying overtime. Under the Tenth Circuit's opinion, employers can require employees to perform non-exempt work for up to ninety-nine percent of their time and still not have to pay overtime.

The Tenth Circuit's interpretation of 29 C.F.R. §541.504(b) and 29 C.F.R. §541.505(a) is inconsistent with the

spirit and intent of the Fair Labor Standards Act as legislated by the United States Congress. Specifically, the opinion of the Tenth Circuit, in as much as it follows Respondent's interpretation of the Department of Labor's regulations regarding"outside salesmen" and "non-exempt work," defeats the purpose of the FLSA and is manifestly contrary to the intent of Congress when they enacted the FLSA.

Reviewing courts must interpret regulations in a manner that is consistent with the overriding statute such that the regulation does not defeat the purpose of the statute. *Building & Construction Trades' Dept. v. Donovan*, 712 F.2d 611, 616 (D.C. Cir. 1983) *quoting Batterton v. Francis*, 432 U.S. 416 (1977).

The FLSA was enacted for two primary purposes: (1) to make whole employees who have unlawfully been deprived of wages and (2) to eliminate the competitive advantage enjoyed by the employer who has gained illegally by underpaying their workers. *Donovan v. Sovereign Sec., Ltd.*, 726 F.2d 55, 58 (2nd Cir. 1984) *citing Hodgson v. American Can Co.*, 440 F.2d 916, 922 (8th Cir. 1971), *and citing Hodgson v. Wheaton Glass Company*, 446 F.2d 527, 535 (3rd Cir. 1971).

Petitioners are being denied the protections provided to them by the FLSA under the Tenth Circuit's ruling that they are exempt from the overtime requirements. By allowing Respondent to enjoy the fruits of manipulating the exemption provisions under 29 C.F.R. §541.504, the Tenth Circuit is failing to uphold the meaning of the Fair Labor Standards Act.

While regulations promulgated by administrative agencies are generally given deference by reviewing courts, regulations that are either "arbitrary [or] capricious" or are shown to be "manifestly contrary to the statute" will not be reviewed under the deferential standard. *Smiley v. CITIBANK*, 517 U.S. 735, 741 (1996). See also, *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). As interpreted by the Tenth Circuit, the regulations in the present case are clearly contrary to the protections provided by the FLSA.

To determine whether a regulation is consistent with the statute it aims to implement, a reviewing court should look to the "plain meaning" of the statute and to the "design of the statute as a whole." *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291-92 (1987). If the statute is "clear and unambiguous" then a court must refuse to give deference to any agency interpretation that is contrary to the statute. *Id.* The language and meaning of the Fair Labor Standards Act is clear. The FLSA seeks to protect the "health, efficiency, and general well-being of workers." 29 U.S.C. §202(a).

Enabling employers to take advantage of dedicated workers by requiring exempt employees to perform the work of the non-exempt employees fails to comply with the "plain meaning" and the "design" of the FLSA.

The Tenth Circuit has stated that all activities which serve to "enhance sales" should be construed as being "incidental" to Petitioners' work. If such were the case, Respondent could give each of its employees a sales pad, call them outside salesmen, and ask them to stop by their local 7-11

on their way home to pick up an order. All other tasks performed by that employee would become "incidental" if they "enhance sales." This would include manufacturing the can of cola on the assembly line, trucking it to the store, and stocking the can on the store shelf. Each of these tasks "enhance" the sale of Coke products. Under the Tenth Circuit's interpretation of the Department of Labor's regulations, virtually all employees would be exempt from overtime payment as required by the Fair Labor Standards Act.

The ruling by the Tenth Circuit also reaches inequitable results by allowing employers to avoid their overtime obligations under the Fair Labor Standards Act. The Tenth Circuits own opinion acknowledges that inequitable interpretations of statutes should be avoided: "Interpretations of a statue which produce inequitable and unreasonable results should be avoided when alternative interpretations consistent with the statute's language and objective are available. (App. Op. Pg. 17) See also, *Chotin Transp. Inc. v. United States*, 819 F.2d 1342, 1355 (6th Cir. 1986) (concurrence) *citing American Tobacco Co. v. Patterson*, 456 U.S. 63, 71 (1982); *Payne v. Panama Canal Co*, 607 F.2d 155, 164 (5th Cir. 1979); *Virgin Islands v. Berry*, 604 F.2d 221, 225 (3rd Cir. 1979).

Therefore, the Tenth Circuit's interpretation of the Department of Labor's regulations rendered the regulations arbitrary, capricious or manifestly contrary to the intent of the Fair Labor Standards Act.

ARGUMENT 3

The Respondent failed to meet it's burden of proof demonstrating that the Petitioners are exempt from the overtime requirements of the Fair Labor Standards Act.

The burden of proving that employees are exempt from the overtime requirements of the Fair Labor Standards Act falls on Respondent. "An employer seeking an exemption from the overtime requirements of the Act under 29 U.S.C. §213(a)(1) must prove that each employee is entitled to the exemption by plain and unmistakable evidence." *Hodgson v. Klages Coal and Ice Co.*, 435 F.2d 377, 382 (6th Cir. 1970). Although noting this standard in it's opinion, the Tenth Circuit failed to hold the Respondent to it's burden of proof.

The evidence presented at trial in the District Court established that the Respondent did not refute by "plain and unmistakable evidence," the fact that employees in this suit spent up to 65% of their time performing non-sales functions for Respondent. The Tenth Circuit's decision reversing this conclusion, did not hold Respondent to this burden of proof. For this reason alone, this decision should be reversed.

CONCLUSION

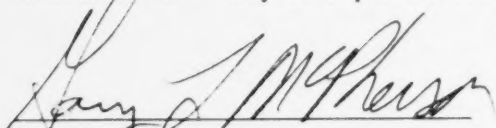
Petitioners are not exempt from the Fair Labor Standards Act overtime requirements due to the "nature" of Petitioners work and the amount of time spent merchandising. Petitioners merchandising activities cannot be considered incidental to and in conjunction with their primary job responsibilities. Therefore, Respondent has not demonstrated that the Petitioners

fall within the outside salesman exemption and the Petitioners must be paid overtime.

In addition, the interpretation of the regulations adopted by the Tenth Circuit Court of Appeals would render the regulations arbitrary, capricious and manifestly contrary to the intent of the Fair Labor Standards Act.

Finally, the Respondent has failed to meet its burden of proof by demonstrating that the Petitioners fall within the outside salesman exemption. Therefore, the Petitioners are entitled to be paid overtime.

Respectfully submitted this 8th day of September, 1999.

By: 

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-and-

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APPENDIX A
[FILED JUNE 10, 1999]

PUBLISH
UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

RICHARD ACKERMAN, TIMOTHY BOOKER, ERICH BUTLER, MICHAEL DICKSON, EDWARD DONAHOE, MICHAEL FABIAN, STEVEN JONES, MARK MARES, ROBERT MOON, JAMES MUELLER, DANA ROE, KIM SMITH, PAUL SPIELMAN, ALAN TAMONDONG, AND BRAD VELLIQUETTE, Plaintiffs - Appellees/Cross-Appellants, v. COCA-COLA ENTERPRISES, INC., a Delaware Corporation in good standing and licensed to do business in Colorado, Defendant-Appellant/Cross-Appellee.	Nos. 97-1079, 97-1102

Appeal from the United States District Court
for the District of Colorado
(D.C.No. 93-OK-1633-TL)

Walter V. Siebert, of Sherman and Howard, Denver, Colorado (Ronald G. Ingham and Kelly L. Weston, of Miller and Martin, Chattanooga, Tennessee, with him on the briefs), for the Defendant-Appellant/Cross-Appellee.

Daniel P. Powell, Alamosa, Colorado (Gary McPherson and Brandon P. Hull, Aurora, Colorado, with him on the briefs), for the Plaintiffs-Appellees/Cross-Appellants.

Before **ANDERSON, EBEL**, and **HENRY,** Circuit Judges.

HENRY, Circuit Judge.

Coca-Cola Enterprises (Coca-Cola) appeals the district court's decision that advanced sales representatives and account managers employed by the company are entitled to overtime compensation under the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201-219.[1] We conclude that these employees are exempt from the overtime compensation requirements of the FLSA because they are "outside salesmen," as that term is defined by Department of Labor regulations. We therefore reverse the decision of the district court and remand for further proceedings consistent with this opinion.

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1 The Coca-Cola advance sales representatives and account managers have filed a cross-appeal in which they challenge several other rulings by the district court. In light of our conclusion regarding the outside salesman exemption, we address neither the issues raised in the cross-appeal nor the other issues raised in Coca-Cola's appeal.

I. BACKGROUND

From 1991 to 1993, the plaintiffs were employed by Coca-Cola as advance sales representatives and account managers. Their primary responsibility was to sell CocaCola products to grocery stores, convenience stores, and mass merchandisers. During the period from 1991 to 1993, Coca-Cola also employed individuals known as "merchandisers." Although merchandisers did not sell Coca-Cola products, they performed a wide variety of tasks associated with the distribution and promotion of the company's products, including: restocking shelves, replacing damaged products, filling coolers, filling vending machines, delivering products and equipment, adjusting and cleaning display shelves, setting up displays, rotating products, hanging signs, cleaning the warehouse, cleaning coolers and shelves, restocking pallets, and transferring products from one store to another.

During the period at issue in this case, Coca-Cola employed two different methods of distribution. Prior to April 1, 1992, Coca-Cola used a hybrid system. For customers whose accounts exceeded four million dollars, the company employed advance sales representatives (including the plaintiffs) to sell the products before delivery. Following the sale, delivery drivers transported Coca-Cola products to the appropriate store. CocaCola's merchandisers then stocked the shelves and performed other merchandising tasks. For smaller accounts, Coca-Cola distributed its products through route sales drivers. These drivers visited stores, sold the product, stocked the shelves, displayed advertisements, and performed all the other required merchandising.

In April 1992, Coca-Cola changed its distribution system such that individuals known as account managers (including the plaintiffs) sold products for both large and small accounts prior to delivery. Under this "presale" system, the account managers visited large grocery stores, convenience stores, and mass merchandisers, sold Coca-Cola products, and performed various merchandising tasks. For the larger grocery store and mass merchandiser accounts, Coca-Cola assigned merchandisers to perform various merchandising tasks. Coca-Cola did not assign merchandisers to the smaller accounts, and, at these locations, the account managers performed the necessary merchandising tasks themselves. The account managers frequently performed these tasks at the larger accounts as well.

In their work as advance sales representatives and account managers, the plaintiffs typically arrived at Coca Cola's offices at about 5:00 a.m. After attending a sales meeting, they gathered advertising materials from a storeroom and loaded them into station wagons supplied by the company. They then visited ten to fifteen grocery stores, fifteen to twenty convenience stores, and a few mass merchandisers. At the grocery stores and mass merchandisers, they inspected product displays and advertising and then determined the amount of available inventory. At certain stores, the plaintiffs also set up advertising materials. After performing these tasks, they spoke to store managers about subsequent deliveries, obtaining approval for Coca-Cola to ship additional products. Delivery drivers then transported the Coca-Cola products to stores, and the merchandisers performed various tasks associated with displaying and promoting the products.

From 1991 until 1993, the plaintiffs regularly worked more than forty hours a week as advance sales representatives

and-account managers. Their hours ranged from an average low of fifty-five hours per week to an average high of seventy-two hours per week. Coca-Cola paid them a salary, bonuses, and commissions. Because Coca-Cola considered them to be exempt from the requirements of the FLSA, the plaintiffs did not receive overtime compensation. In contrast, Coca-Cola viewed delivery drivers and merchandisers as subject to the FLSA and paid them overtime.

The plaintiffs filed this action in July 1993, alleging that Coca-Cola had violated the FLSA by failing to pay them overtime compensation. Coca-Cola responded that the FLSA's overtime compensation requirements were not applicable to the plaintiffs because of the statutory exemptions governing outside salesmen and motor carriers and because of the exemption governing positions consisting of a combination of two or more exempt jobs.

After a bench trial, the district court issued a memorandum opinion rejecting CocaCola's arguments under each of the claimed exemptions and concluding that the plaintiffs were entitled to overtime compensation under the FLSA. The court also rejected CocaCola's argument that the plaintiffs' damages should be calculated on the basis of the "fluctuating work week method," under which a successful plaintiff receives overtime compensation at only half his or her regular rate (instead of the usual one-and-a-half times his or her regular rate). See 29 C.F.R. § 778.114 (discussing the fluctuating work week method). Finally, the court rejected the plaintiffs' argument that they were entitled to liquidated damages, reasoning that Coca-Cola had demonstrated that it acted in good faith and had reasonable grounds for believing that its actions did not violate the FLSA.

II. DISCUSSION

Congress enacted the FLSA, 29 U.S.C. § 201-219, in order to improve "labor conditions detrimental to the maintenance of the minimum standard of living necessary for the health, efficiency, and general well-being of workers." 29 U.S.C. § 202(a). In furtherance of this aim, the FLSA established a minimum wage, required overtime pay in certain instances, and prohibited child labor. See 29 U.S.C. §§ 206, 207, 212.

In spite of these broad remedial aims, Congress concluded that not all workers required the same kind of protection. It exempted from the FLSA's requirements "any employee employed in a bonafide executive, administrative, or professional capacity . . . or in the capacity of outside salesman (as such terms are defined and delimited from time to time by regulations of the Secretary [of Labor] ....)" 29 U.S.C. § 213(a)(1).

Exercising that delegated authority, the Secretary has promulgated a series of regulations that define these exemptions. 29 C.F.R. § 541.500 defines the term "outside salesman" as:

> any employee:
> (a) who is employed for the purpose of and who is customarily and regularly engaged away from his employer's place or places of business in:
>
> (1) making sales

within the meaning of section 3(k) of the Act; or

(2) Obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer; and

(b) Whose hours of work of a nature other than that described in paragraph (a)(1) or (2) of this section do not exceed 20 percent of the hours worked in the workweek by nonexempt employees of the employer: *Provided,* That work performed incidental to and in conjunction with the employee's own outside sales or solicitations, including incidental deliveries and collections~ shall not be regarded as nonexempt work.

(emphasis added).

In the district court proceedings, Coca-Cola contended that the plaintiffs were "outside salesmen" under the definition set forth in § 541.500. The company focused on the proviso of subsection (b), arguing that although the plaintiffs performed some merchandising tasks, those tasks were "incidental to and in conjunction with" their sales of Coca-Cola products. Significantly, in the district court proceedings, there was no dispute as to either subsection (a) of § 541.500 or the first part of subsection (b). The parties agreed that the plaintiffs were employed for the purpose of selling Coca-Cola's products and that they were regularly and customarily engaged in that activity away from Coca-Cola's offices. See 29 C.F.R. § 541.500. They also agreed that the time that the plaintiffs spent performing work of a nonexempt nature (i.e. merchandising) exceeded twenty percent of the hours worked by nonexempt workers (i.e. merchandisers). Thus, the district court's determination of whether the plaintiffs were outside salesmen depended entirely upon the question raised by § 541.500(b)'s proviso-whether the plaintiffs' merchandising tasks were "incidental to and in conjunction with" their sales of Coca-Cola products.

In its memorandum opinion, the district court concluded that Coca-Cola had failed to establish that the plaintiffs' merchandising activities were "incidental to and in conjunction with" their own sales. The court cited testimony "that merchandising was primarily done because customers expected it to be done and that merchandising increased the sale of Coca-Cola products in general." Aplt's App. at 16-17. Additionally, the court noted that merchandising activities occupied anywhere from twelve to forty-one hours of the plaintiffs' time each week. Id. at 17 n.5. Noting that "incidental" means "occurring or apt to occur as an unpredictable or minor concomitant" or "of a minor, casual, or subordinate nature," see id. (quoting Webster's

II New Riverside University Dictionary 618 (1984)), the court said that "[a]n activity that consumes anywhere from 20 to 65 percent of an employee's workday cannot be said to be a minor occurrence." Id. It therefore concluded that the plaintiffs were not outside salesmen under the FLSA.

On appeal, Coca-Cola argues that the district court erred in applying the phrase "incidental to and in conjunction with" in the proviso of 29 C.F.R. § 541.500(b). Under the Department of Labor's regulations, Coca-Cola maintains, the merchandising work performed by the plaintiffs, though often time-consuming, was still incidental to and in conjunction with their own sales of Coca-Cola products; as a result, the plaintiffs' merchandising responsibilities do not defeat the outside salesman exemption.

In response, the plaintiffs maintain that Coca-Cola's reading of the outside salesman exemption conflicts with the policies underlying the FLSA. The plaintiffs observe that, under Coca-Cola's reading of the applicable regulations, merchandising work could be exempt from the FLSA when performed by outside salesmen but governed by the FLSA when performed by merchandisers. Such an interpretation, the plaintiffs contend, allows Coca-Cola to avoid the overtime compensation requirements of the FLSA entirely by exploiting the distinction between merchandisers and account managers. They observe that under Coca-Cola's reading of the regulations, the company would be permitted to employ non-exempt merchandisers for only forty hours a week while requiring account managers (who are exempt as outside salesmen under Coca-Cola's interpretation of the FLSA) to work more than forty hours a week in order to complete the merchandising work left undone by the merchandisers.

In light of the parties' arguments, the question before us is the same one presented to the district court: whether the plaintiffs' merchandising activities were "incidental to and in conjunction with" their sales of Coca-Cola products such that the plaintiffs were covered by the FLSA exemption for outside salesmen. We review the district court's resolution of this legal question de novo, see Sanders v. Elephant Butte Irrigation District, 112 F.3d 468,470 (lOth Cir. 1997), but we examine the underlying factual determinations for clear error. Id. Additionally, in light of the FLSA's broad remedial aims, exemptions must be narrowly construed. Carpenter v. City & County of Denver Colo., 82 F.3d 353, 355 (lOth Cir. 1996) (citing Mitchell v. Lublin. McGaughy. & Assocs. ,358 U.S. 207, 211(1959)). As the employer, Coca-Cola bears the burden of proving that particular employees fit "'plainly and unmistakenly within [the exemption's] terms."' Reich v. Wyoming, 993 F.2d 739, 741 (lOth Cir. 1993) (quoting Arnold v. Ben Kanowsky Inc., 361 U.S. 388, 392 (1960)). However, "the [Department of Labor] regulations are entitled to judicial deference and are the primary source of guidance for determining the scope of exemptions to the FLSA." Spradling v. City of Tulsa, 95 F.3d 1492,1495 (lOth Cir. 1996) (citation omitted).

A. Department of Labor Regulations Regarding Outside Salesmen

As Coca-Cola suggests, the Department of Labor's regulations provide guidance in determining what tasks may be considered "incidental to and in conjunction with" the plaintiffs' sales of Coca-Cola products. Section 541.503 uses that phrase in the following manner:

> Work performed "incidental to and in conjunction with the employee's own outside sales or solicitation" includes not only incidental deliveries and collections . . ., but also any other work performed by the employee in furthering his own sales efforts. Work performed incidental to and in conjunction with the employee's own outside sales or solicitations would include, among other things, the writing of his sales reports, the revision of his own catalog, the planning of his itinerary and attendance at sales conferences. 29 C.F.R. §541.503 (emphasis added).

The subsequent regulations describe in more detail the kinds of activities that are viewed as "in conjunction with and incidental to" outside sales. See 29 C.F.R. §§ 541.504-541.505. These regulations address promotional work and the work of"driver salesmen," who deliver products and make sales. In both instances, a key inquiry is whether the employee in question actually consummates the sale of his or her employer's products at a particular location. If that employee consummates the sale but also performs a variety of other tasks intended to promote the company's products but not directly involving sales, those tasks may still be considered "incidental to and in conjunction with" those sales. On the other hand, if the employee in question does not actually consummate the sale at

the location in question, then his other activities, even if closely related to sales, are not "incidental to and in conjunction with" those sales under the regulations.

For example, the Department of Labor's regulation regarding promotional work gives the illustration of a manufacturer's representative who visits retailers accompanied by a salesman for a distributor (or "jobber"). If the manufacturer's representative does preliminary work ("which may include arranging the stock, putting up a display or poster, and talking to the retailer for the purpose of getting him to place the order for the product"), but the distributor's salesman actually takes the order after the preliminary work is done, then such work is not incidental to sales made by the manufacturer's representative and is not exempt. See 29 C.F.R. § 541.505(c)(2). The same regulation gives an example of a nonexempt company representative who visits stores in order to perform promotional work but does not complete the sale of his company's products:

> [A]nother type of situation involves the company representative who visits chainstores, arranges the merchandise on shelves, replenishes stock by replacing old with new merchandise, consults with the manager as to the requirements of the store, fills out a requisition for the quantity wanted and leaves it with the store manager to be transmitted to the central warehouse of the chainstore company which later ships the quantity requested. The

> arrangement of merchandise on the shelves or the replenishing of stock is not exempt work unless it is incidental to and in conjunction with the employee's own outside sales. Since the manufacturer's representative in this instance does not consummate the sale nor direct his efforts toward the consummation of a sale (the store manager often has no authority to buy) this work must be counted as non-exempt.

29 C.F.R. § 541.504 (c)(4) (emphasis added).

The regulation regarding driver salesmen, 29 C.F.R. § 541.505, adopts a similar approach. It contrasts a route driver who does not make sales at the locations he visits (and is therefore not covered by the exemption for outside salesmen) with a route driver who takes orders or obtains commitments for the products he delivers (and is therefore covered by the exemption):

> [A] route driver primarily engaged in making deliveries to his employer's customers and performing activities intended to promote sales by customers, including placing point-of-sale and other advertising materials, price stamping commodities, arranging merchandise on shelves

> or in coolers or cabinets, rotating stock according to date, and cleaning and otherwise servicing display cases is not employed in the capacity of outside salesman by reason of such work. Such work is nonexempt work for purposes of this part unless it is performed as an incident to or in conjunction with sales actually made by the driver to such customers. If the driver who performs such functions actually takes orders or obtains commitments from such customers for the products he delivers, and the performance of the promotion work is in furtherance of his own sales efforts, his activities for that purpose in the customer's establishment would be exempt work.

29 C.F.R. § 541.505(d) (emphasis added).

Courts considering the outside salesman exemption have applied this distinction between employees who consummate sales at out-of-the-office locations and those employees who do not consummate sales there. For example, in Skipper v. Superior Dairies, Inc., 512 F.2d 409,416 (5th Cir. 1975), the Fifth Circuit reversed a district court's ruling that a dairy product distributor's routeman was covered by the outside salesman exemption, reasoning that the routeman's responsibility was to deliver

products in prearranged amounts. The court cited testimony from the district court proceedings indicating that the sale of the dairy products was made not by the routeman but by other individuals in the company. See id. at 414-415. In an earlier case, the Sixth Circuit reached a similar conclusion, holding that a soft drink bottler's routeman was not covered by the outside salesman exemption because the routeman did not solicit orders and because the managers of the stores that he visited lacked the authority to enter into binding sales agreements with the routeman. See Hodgson v. Klages Coal & Ice Co.,435 F.2d 377, 383 (6th Cir. 1970). In contrast, other courts have concluded that driver-salesmen who make sales of their employers' products at the locations they visit are covered by the outside salesman exemption. See e.g., Hodgson v. Krispy Kreme Doughnut Co.,346 F. Supp. 1102, 1107 (M.D.N.C. 1972).

B. The Outside Salesman Exemption in this Case

In the case before us, the record indicates that, as advance sales representatives and account managers, the plaintiffs consummated the sales of Coca-Cola products at the stores that they visited. In this regard, we note that the parties have not challenged the district court's conclusion that the plaintiffs were employed for the purpose of selling Coca-Cola products and were regularly engaged in that activity. The parties also have not challenged the district court's description of Coca-Cola's distribution systems and of the plaintiffs' sales responsibilities under those systems. Moreover, in testimony at trial, several of the plaintiffs described their taking of orders for company products from store managers. See Aplt's App. at 85, 152. There is no evidence in the record that sales of Coca-Cola products at stores visited by the plaintiffs were made by any other Coca-Cola employees, and neither in the district court proceedings

nor in this appeal have the plaintiffs disputed the proposition that it was through their own transactions with personnel from stores carrying Coca-Cola products that sales were accomplished. The plaintiffs thus resemble the exempt "driver salesman" identified in 29 C.F.R. § 541.505(d), an employee who "actually takes orders or obtains commitments from . . . customers." In light of their authority to effect sales at the stores they visited, plaintiffs may be contrasted with the nonexempt manufacturer's representative discussed in 29 C.F.R. § 541.504 (c)(4)-the one who "does not consummate the sale nor direct his efforts toward the consummation of a sale."

Because the plaintiffs consummated sales of Coca-Cola products at the stores they visited, the work that they performed in promoting those sales is "incidental to and in conjunction with" those sales under the Department of Labor's regulations. See 29 C.F.R. § 541.504 (a) (stating that "any promotional work which is actually performed incidental to and in conjunction with an employee's own outside sales or solicitations is clearly exempt work. On the other hand, promotional work which is incidental to sales made, or to be made, by someone else cannot be considered as exempt work."); 29 C.F.R. § 541.505(d) (stating that promotion work and delivery work are exempt if incidental to and in conjunction with the employee's own sales or efforts to sell). Here, the plaintiffs have not disputed Coca-Cola's contention that their various merchandising tasks promoted sales of Coca-Cola products at the stores they visited. Instead, they argue only that because merchandising work is considered non-exempt if performed by merchandisers, it should also be considered non-exempt when performed by outside salesmen. See Aplee's Br. at 14-17. This argument misconstrues the Department of Labor regulations, which provide that promotional work performed by employees who

consummate sales may be covered by the outside salesman exemption even if the same work would not be exempt if performed by other employees. See. e.g.,29 C.F.R § 541.504(b)(2) (noting that "[i]ncidental promotional activities may be tested by whether they are 'performed incidental to an in conjunction with the employee's own outside sales or solicitations' or whether they are incidental to sales which will be made by someone else."). Therefore, we conclude that the plaintiffs' merchandising work was "incidental to and in conjunction with" their outside sales of Coca-Cola products under the proviso of § 541.500(b). As a result, in spite of their merchandising work, the plaintiffs are covered by the outside salesman exemption.

In reaching the contrary conclusion, the district court relied on testimony that "merchandising was primarily done because the customers expected it to be done and that merchandising increased the sales of Coca-Cola products in general." Aplt's App. at 1617. Although we do not dispute the district court's characterization of this testimony, we note that neither the fact that the plaintiffs were motivated by a desire to please customers nor the fact that merchandising increased sales of products at other locations is determinative of what activities are "incidental to and in conjunction with" outside sales under the Department of Labor regulations. Instead, what matters is whether the plaintiffs--or someone else--sold Coca-Cola products at the locations where the plaintiffs performed merchandising activities and whether, if the plaintiffs sold Coca-Cola products at those locations, their merchandising work promoted those sales.

The district court also relied on the quantity of merchandising work performed by the plaintiffs in certain

weeks, reasoning that an activity that consumes anywhere from twenty to sixty-five percent of an employee's work week cannot be characterized as incidental. Id. at 17. Although the district court's reasoning is persuasive under the dictionary definition of"incidental" on which it relied, that dictionary definition is not applicable here. Instead, we must apply the phrase as used in the applicable regulations, which use the phrase "incidental to and in conjunction with" in a manner not directly correlated to the amount of time expended. See 29 C.F.R. § 541.505 (a) (stating that "[a] determination of an employee's chief duty or primary function must be made in terms of the basic character of the job as a whole" and that "the time devoted to the various duties is an important, but not necessarily controlling, element").

We agree with the plaintiffs that, as the Department of Labor regulations are written and as Coca-Cola has interpreted them, the company may be allowed to avoid paying overtime in certain instances by assigning merchandising tasks to account managers rather than to merchandisers. Although such an assignment may be inequitable and subject to challenge on other grounds, the evidence in this case does not establish a violation of the FLSA under the current Department of Labor regulations. Because Congress has delegated the authority to define the FLSA exemptions to the Department of Labor, and because the plaintiffs have not here challenged those regulations as arbitrary, capricious, or manifestly contrary to the statute, see Chevron~ U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844 (1984), our task here is to apply the exemptions as defined in the regulations.

III. CONCLUSION

We therefore conclude that the plaintiffs are exempt from the FLSA as outside salesmen. The district court's decision is reversed, and the case is remanded to the district court for further proceedings consistent with this opinion.

APPENDIX B

[FILED JANUARY 27, 1997]

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

Civil Action No. 93-OK-1633-TL

RICHARD ACKERMAN, TIMOTHY BOOKER, ERICH BUTLER, MICHAEL DICKSON, EDWARD DONAHOE, MICHAEL FABIAN, STEVEN JONES, MARK MARES, ROBERT MOON, JAMES MUELLER, DANA ROE, KIM SMITH, PAUL SPIELMAN, ALAN TAMONDONG, BRAD VELLIQUETTE, and JAMES M. FORBES,

Plaintiffs,

v.

COCA-COLA ENTERPRISES INC., a Delaware corporation and in good standing and licensed to do business in Colorado,

Defendant.

MEMORANDUM OPINION

Claiming that defendant owes them unpaid overtime compensation, plaintiffs filed this action for damages on August

3, 1993, pursuant to the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201-219.[1] In addition to seeking overtime compensation, plaintiffs seek an award of liquidated damages and attorney's fees. Defendant contends that plaintiffs are salaried employees exempt from the overtime requirements of the FLSA. Specifically, defendant argues that plaintiffs are exempt under either the motor carrier exemption, the outside sales exemption, or a combination exemption. On October 21, 22, and 23, 1996, this matter was tried to the court without a jury. In accordance with Fed. R. Civ. P. 52(a), this memorandum opinion constitutes the court's findings of fact and conclusions of law.

The evidence presented at trial[2] and the stipulations of the

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1 Twenty plaintiffs originally filed this action. On September 14, 1993, the court permitted plaintiffs to amend the complaint to add claims for plaintiff James M. Forbes. Five plaintiffs have been dismissed from this action pursuant to stipulations of dismissal: Carlton Hockaday, by Order dated February 4, 1994, Dorothy Manley, by Order dated February 4, 1994; Larry Markwell, by Order dated May 2, 1994; Richard Loos, by Order dated March 28, 1995; and Penny Griffith, by Order dated May 12, 1995.

2 During their case in chief, plaintiffs presented the live testimony of plaintiffs Timothy Booker, Dana Roe and Michael Dickson. The parties stipulated that their testimony "is representative of the testimony of the remaining Plaintiffs except that the dates of employment would vary, the District Sales Manager to whom they were assigned would vary, and their total damages would vary. Each of the remaining Plaintiffs would testify consistent with their Supplemental Interrogatory Responses as to the number of hours worked while employed by the Defendant, as to the number of hours that they spent doing merchandising activities while employed by the Defendant." Stipulation as to Witnesses and Exhibits (Oct.. 23, 1996). Defendant presented the live testimony of Greg Feasel, Wilton Washington and Tony Rodriguez-Milligan. The parties stipulated that their testimony "is representative of the testimony to be presented by Defendant's other listed

parties establish that plaintiffs were employed by defendant as "Account Managers" or "Advanced Sales Representatives" for various periods of time during the two years preceding the filing of the complaint.[3] Defendant is engaged in the production of Coca-Cola brand beverages and the distribution of such products along with other beverages. Prior to April 1, 1992, defendant utilized a hybrid system for distribution. For "major accounts," that is accounts which annually bought more than four million dollars worth of product, defendant employed Account Sales Representatives to presell the product. Delivery drivers would then transport the product to the major account, where individuals known as "merchandisers" would stock the shelves and perform other merchandising tasks. Prior to April 1, 1992, all other accounts were served by conventional route sales drivers who would call on the customer, make the sale, simultaneously deliver the product, restock the shelves and displays, hang advertising, and clean shelves and coolers. Defendant compensated Account Sales Representatives by paying them a salary, plus bonuses and commissions; Account Sales Representatives were not paid any overtime compensation.

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witnesses." Id. In addition, defendant presented the live testimony of Paul King.

3 On May 18, 1995, the court found that this action is governed by the two-year statute of limitations, rather than the three-year limitations for willful violations of the FLSA. Fourteen of the plaintiffs are seeking overtime compensation for periods of time subsequent to April 1, 1992; five plaintiffs claim overtime compensation for the period of time prior to April 1, 1992. In light of the court's statute of limitations ruling, however, overtime compensation cannot be sought for any period prior to August 3,1991 Therefore, the claim of plaintiff James M. Forbes, which seeks overtime for the period prior to July 15,1991, is barred by the court's May 18,1995 ruling on the statute of limitations.

Likewise, conventional route sales drivers did not receive overtime compensation; their compensation package consisted of salary, plus bonuses and commissions. Defendant, however, considered delivery drivers and merchandisers to be non-exempt employees; these employees, therefore, were paid on an hourly basis and received overtime compensation at 11/2 times their hourly rate for all hours over forty hours worked in any workweek.

After April 1, 1992, defendant utilized a total pre-sell system for distribution of its product. Account Managers visited all major accounts, down-the-street accounts (convenience stores and small grocery stores) and mass merchandisers (discount stores such as Wal-Mart, Walgreens and Phar-Mor) to receive orders for product. All product was subsequently delivered to the account by delivery drivers. Merchandisers were used to merchandise the major accounts and some mass merchandiser accounts. The Account Managers performed the merchandising tasks at all down-the-street accounts and frequently performed such tasks at major and mass merchandiser accounts. Merchandising consists of:

> Restocking shelves, filling coolers, filling vendors, delivering product, adjusting and cleaning display shelves, setting up the displays, rotating the product, hanging signs, placing day glow stickers, cleaning up warehouse, cleaning coolers and shelves, delivery of product and equipment, replacing damaged product, trading out production for promotion,

> restocking pallets, rotating displays, rotating shelves, transferring product from one store to another, putting up point of sale signs, putting up corobuff, pulling product forward.

Stipulation of the Parties (Oct. 16, 1996).

Plaintiffs began their workdays at approximately 5:00 a.m. During a typical day, plaintiffs' would attend a sales meeting or meet with their immediate supervisor or their merchandisers to discuss sales issues. Following the meeting, plaintiffs would gather advertising materials, known as point of sale or POS material from the "POS room." The POS materials, which were ordered in bulk by defendant, were shipped to defendant's plant from outside the State of Colorado and were stored in the POS room at defendant's warehouse. While some of the POS material may have been slated for a particular chain of stores, none of the material was designated for a specific geographic destination. Using station-wagons supplied by defendant, plaintiffs transported the POS material from defendant's warehouse to the stores they serviced.

During a typical day, an Account Manager would visit 10 to 15 major accounts, 15 to 20 down-the-street accounts and a few mass merchandisers. Plaintiffs testified that mass merchandisers were not visited daily; rather, the Account Manager would call on these accounts every two or three days. At a major and mass merchandiser accounts, the Account Manager would walk the store to determine the location and condition of Coca-Cola displays versus the competitors' displays. The Account Manager would determine the available

inventory of product in displays, on shelves and in the storeroom. Oftentimes, Account Managers performed merchandising functions, such as restocking and cleaning shelves and displays, rotating stock and pulling stock forward. The Account Manager would also ensure that POS materials were properly displayed. Finally, the Account Manager would speak to the store's manager to verify the amount of product to be shipped to the store. At down-the-street accounts and mass merchandiser accounts that were not assigned merchandisers, the Account Manager not only presold the product, but also performed all of the merchandising tasks.

It is undisputed that plaintiffs worked more than 40 hours per week as Account Managers.[4] It is also undisputed that plaintiffs did not receive any overtime compensation for the additional hours worked. The parties have stipulated that "in certain work weeks, an account manager would spend in excess of 20% of the time spent by non-exempt merchandisers" performing merchandising tasks. Stipulation of the Parties (Oct. 16, 1996).

In general, the FLSA requires employers to pay their employees at least 1 ½ their regular pay for hours worked in excess of 40 hours per week. 29 U.S.C. § 207. The overtime requirement, however, does not apply to "any employee employed in a bona fide executive . . . capacity . . . or in the capacity of outside salesman (as such terms are defined and delimited from time to time by regulations of the Secretary [of

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4 Plaintiffs worked varying hours, ranging from an average low of 55 hours per week to an average high of 72 hours per week See Exhibit BN.

Labor] ...." 29 U.S.C. § 213(a)(1). In addition, the overtime provisions do not apply to "any employee with respect to whom the Secretary of Transportation has power to establish qualifications and maximum hours of service pursuant to the provisions of section 3102 of Title 49." 29 U.S.C. § 213(b)(1).

> The defendant bears the burden of proving that an employee falls within a FLSA exemption. *Corning Glass Works v. Brennan*, 417 U.S. 188, 196-97, 94 S. Ct. 2223, 2229, 41 L. Ed. 2d 1 (1974); *Department of Labor v. City of Sapulpa*, 30 F.3d 1285, 1287 (10th Cir. 1994). An employee must fit "plainly and unmistakenly within the exemption's terms," and FLSA exemptions are to be narrowly construed. *Aaron v. City of Wichita*, 54 F.3d 652, 657 (10th Cir.) (internal quotation marks omitted), *cert. denied*, --- *U.S.* ---, 116 S. Ct. 419, 133 L. Ed. 2d 336 (1995).

Hays v City of Pauls Valley, 74 F.3d 1002, 1005-6 (10th Cir. 1996). The regulations issued by the Department of Labor "are the primary source of guidance for determining the scope and extent of exemptions to the FLSA." Spradling v. City of Tulsa, 95 F.3d 1492, 1495 (10th Cir. 1996).

To establish the outside salesman exemption, defendant must satisfy a two-prong test. First, defendant must show that

plaintiffs were employed for the purpose of making sales of defendant's products and were regularly and customarily engaged in that activity away from defendant's warehouse. 29 C.F.R § 541.500(a) (1996). In addition, defendant must demonstrate that the hours spent by plaintiffs performing nonexempt work did "not exceed 20 percent of the hours worked in the workweek by nonexempt employees of the employers: *Provided*, That work performed incidental to and in conjunction with the employee's own outside sales or solicitations, including incidental deliveries and collections, shall not be regarded as nonexempt work." 29 C.F.R. § 541.500(b) (1996). The parties do not dispute that the first prong of this test is met. In addition, the parties have stipulated that, except for the proviso, defendant cannot meet the second prong of this test because the time plaintiffs spent performing nonexempt work exceeded 20 percent of the hours worked by nonexempt workers. Therefore, the issue in this case is whether defendant has met its burden of proof with respect to the proviso contained in the second prong, specifically whether the merchandising tasks performed by plaintiffs can be said to be "incidental to and in conjunction with" plaintiffs' sales within the meaning of the regulations. The regulations counsel that:

> With such variations in the methods of selling and promoting sales each case must be decided upon its facts. In borderline cases the test is whether the person is actually engaged in activities directed toward the consummation of his own sales, at least to the extent of obtaining a commitment to buy from the person to whom he

> is selling. If his efforts are directed toward stimulating the sales of his company generally rather than the consummation of his own specific sales his activities are not exempt.

29 C.F.R. § 541.504(b)(2) (1996) (emphasis added).

Therefore, under the regulations, defendant must establish that the merchandising activity enhanced the specific sales of the individual plaintiffs and not just the sales of Coca-Cola products in general. While there was some evidence in the record that plaintiffs' merchandising tasks were done to increase their specific sales, the preponderance of the evidence reflects that the witnesses consistently testified that merchandising was primarily done because the customers expected it to be done and that merchandising increased the sale of Coca-Cola products in general. Moreover, it cannot be said that plaintiffs' merchandising activities were "incidental" to their primary duty of outside sales. "Incidental" is defined as "occurring or apt to occur as an unpredictable or minor concomitant" or "of a minor, casual, or subordinate nature." Webster's II New Riverside University Dictionary 618 (1984). An activity that consumes anywhere from 20 to 65 percent of an employee's workday cannot be said to be a minor occurrence.[5] Moreover, plaintiffs

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5 Plaintiffs estimate that they spent the following amount of time on merchandising tasks: Ackerman - 55%; Booker - 25-30%; Butler - 60%; Dickson - 30%; Donohoe - 30%; Fabian - 50%; Jones - 25%; Mares - 50%; Moon -25-30%; Mueller - 40%; Roe - 40%; Smith - 60-65%; Spielman - 45%; Tamondong - 20%; and Velliquette - 40%. See Defendant's Exhibit BN. Depending on the individual, this results in a low

were expected to perform such tasks on a daily basis, as evidenced by the fact that merchandising was listed as part of the Account Manager's duties and the Account Managers were evaluated on their merchandising skills. See Plaintiffs' Exhibit 33; see, e.g, Plaintiffs' Exhibit 49 at C146, C150; Plaintiffs' Exhibit 56 at C376, C378, C380; see also Plaintiffs' Exhibit 49 at C214 ("Merchandising is an important part of our overall marketing strategy, and the execution of merchandising standards is a key element in reaching our marketing objectives."). As a result, defendant has not demonstrated that plaintiffs fit "plainly and unmistakenly" within the outside salesman exemption.

The court also finds that defendant did not sustain its burden of establishing that plaintiffs are exempt under a combination exemption. The regulations permit an employer to "tack" exempt work under one category onto exempt work under another category in order to qualify an employee for an exemption that is a combination of the two exemptions. See 29 C.F.R. § 541.600 (1996). In this case, defendant contends that plaintiffs fall under a combination exemption based on executive and outside salesman duties.

> In combination exemptions, however, the employee must meet the stricter of the requirements on salary and nonexempt work. For instance, if the employee performs a combination of an executive's and an outside salesman's function

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of 12 hours per week spent on non-exempt tasks to a high of more than 41 hours per week on such tasks.

> (regardless of which occupies most of his time) he must meet the salary requirement for executives. Also, the total hours of nonexempt work under the definition of "executive" together with the hours of work which would not be exempt if he were clearly an outside salesman, must not exceed either 20 percent of his own time or 20 percent of the hours worked in the work-week by the nonexempt employees of the employer, whichever is smaller.

541.600(a)(1996).The Court of Appeals for the Eighth Circuit has interpreted this regulation as requiring the employer to "show that the employee falls within a combination of the long tests . . . [the employer] cannot rely on a combination of the short tests. This means that an employee will qualify for a combination exemption only if he does not devote more than 20% of his time to nonexempt work." Auer v. Robbins, 65 F 3d 702, 722 (8th Cir. 1995), cert. granted, 116 S. Ct. 2545 (1996). As the parties have stipulated that plaintiffs "would spend in excess of 20% of the time spent by non-exempt merchandisers" performing nonexempt tasks, defendant cannot meet its burden under the combination exemption.

Finally, the court concludes that plaintiffs are not exempt under the motor carrier exemption. The motor carrier exemption applies to those employees who are subject to regulation by the Secretary of Transportation. The Secretary of Transportation's power to regulate employees is limited to those employees who

meet two tests. First, the employee must be "employed by carriers whose transportation of passengers or property by motor vehicle is subject to his jurisdiction under section 204 of the Motor Carrier Act ...." 29 C.F.R. § 782.2(a) (1996). Second, the employee must "engage in activities of a character directly affecting the safety of operation of motor vehicles in the transportation on the public highways of passengers or property in interstate or foreign commerce within the meaning of the Motor Carrier Act." Id. The key in this case is whether plaintiffs' intrastate transportation of POS materials constitutes transportation of property in interstate commerce.

> Transportation within a single state may remain "interstate" in character when it forms part of a "practical continuity of movement" across state lines from the point of origin to the point of destination. The characterization of such transportation as interstate or intrastate depends upon the "essential character" of the shipment.
>
> "'Crucial to a determination of the essential character of a shipment is the shipper's fixed and persisting intent at the time of shipment.'" To make this determination . . . [t]his test, set out in 29 C.F.R. § 782.7(b)(2), concludes that there is no fixed and persisting intent to ship goods in interstate commerce

where:

> (i) At the time of shipment there is no specific order being filled for a specific quantity of a given product to be moved through to a specific destination beyond the terminal storage, and (ii) the terminal storage is a distribution point or local marketing facility from which specific amount of the product are sold or allocated, and (iii) transportation in the furtherance of this distribution within the single State is specifically arranged only after sale or allocation from storage.

Foxworthy v. Hiland Dairy Co., 997 F.2d 670, 672-73 (10th Cir. 1993) (citations omitted). Pursuant to this test, the court finds

there was no "fixed and persisting intent" to ship the POS material in interstate commerce. The evidence demonstrates that the POS material is general marketing material that is not designated for specific geographic destinations; this is not a case where the shipper knew exactly which customer was going to receive which piece of POS and in what amount. C.f., Foxworthy, 997 F.2d at 673. There was no evidence that "a specific quantity" of POS material was ever designated "to a specific destination." In addition, the POS room is akin to a local marketing facility from which POS material is allocated; transportation of such material does not occur -- indeed cannot occur -- until after such allocation from storage. In short, the court finds that defendant has not sustained its burden of establishing that the motor carrier exemption applies.

Having found that plaintiffs are nonexempt employees, the final issue for decision is the measure of damages. The parties have stipulated to the amount of damages depending on the theory used by the court. Plaintiffs contend that they should receive 1 1/2 times their regular pay for all hours over 40 during any given workweek. Defendant contends that plaintiffs' overtime wages should be calculated on a "fluctuating workweek" basis. Under the fluctuating workweek method, payment of overtime at 1/2 of the regular rate in addition to the employee's salary satisfies the overtime pay requirement. 29 C.F.R. § 778.114(a) (1996). This method of overtime compensation may not be used "unless the employee clearly understands that the salary covers whatever hours the job may demand in a particular workweek and the employer pays the salary even though the workweek is one in which a full schedule of hours is not worked." 29 C.F.R. § 778.114(b) (1996).

> "[T]he term, 'irregular hours of work,' does not mean merely a fluctuating long workweek, consisting only or mostly of variations in the hours required *over* forty. For hours to be considered irregular within the meaning of section [20]7(f), they must, in a *significant* number of weeks, fluctuate *both* below forty hours per week as well as above "

Crenshaw v. Quarles Drilling Corp., 798 F.2d 1345, 1348 (lOth Cir. 1986) (quoting Donovan v. Brown Equipment and Service Tools Inc., 666 F.2d 148, 154 (5th Cir. 1982)) (emphasis in Crenshaw). There is no evidence that plaintiffs ever worked less than 40 hours per week, much less did so in a significant number of weeks Thus, the court finds that the fluctuating workweek method is not applicable to this case. Plaintiffs are therefore entitled to the stipulated damages set forth in the column entitled "Time and One-half Calculation" on Plaintiffs' Exhibit 106.

The final damage issue is whether plaintiffs are entitled to an award of liquidated damages.

> The FLSA provides that an employer who violates the overtime provisions of § 207 ordinarily is liable for unpaid overtime compensation and "an additional equal amount as liquidated damages." . . . [T]he

> district court may eliminate or reduce the award of liquidated damages only if the employer demonstrates "both that he acted in good faith and that he had reasonable grounds for believing that his actions did not violate the Act." "The good faith requirement mandates the employer have 'an honest intention to ascertain and follow the dictates of the Act. '" "The additional requirement that the employer have reasonable grounds for believing that his conduct complies with the Act imposes an objective standard by which to judge the employer's behavior."

Dept of Labor v. City of Sapulpa, 30 F.3d 1285, 1288-89 (lOth Cir. 1994). Based on this standard, the court finds that defendant has demonstrated that it acted in good faith and had reasonable grounds for believing that its actions did not violate the FLSA. It is undisputed that defendant paid overtime compensation to those employees it thought fell within the ambit of the FLSA and that it thought plaintiffs fell within the outside salesman exemption to the FLSA. The fact that this court disagrees with defendant's interpretation does not lessen the reasonableness of that interpretation. In addition, the court finds that defendant acted in good faith. It monitored the compensation paid by its competitors; the evidence established that defendant's competitors also treated employees similarly situated to plaintiffs as exempt employees. The court stresses that this case

presented a very close question on the issue of liability. Resolution of the exemption issue was intensely factually based and ultimately turned on the fact that plaintiffs' nonexempt activities could not be viewed as incidental to their management and outside sales activities. Thus, in light of the closeness of the liability issue and based on the record as a whole, the court exercises it discretion to eliminate the award of liquidated damages.

In sum, based on all the evidence the court concludes that defendant failed to carry its burden of demonstrating that plaintiffs are exempt from the overtime provisions of the FLSA, but did carry its burden with respect to liquidated damages. Therefore, the court awards plaintiffs the following sums:

Plaintiff	Compensation
Richard Ackerman	$12,792.24
Timothy Booker	37,603.32
Erich Butler	27,468.00
Michael Dickson	40,102.20
Edward Donahoe	66,835.80
Michael Fabian	18,559.45
Steven Jones	43,828.20
Mark Mares	19,423.80
Robert Moon	19,688.60
James Mueller	39,173.40
Dana Roe	86,963.52
Kim Smith	6,132.75
Paul Spielman	27,311.04
Alan Tamondong	9,839.76
Brad Velliquette	22,683.60

No damages are awarded to plaintiff James M. Forbes, as his claim is barred by the statute of limitations. Judgment will issue accordingly.

It is so ordered this 27th day of January, 1997.

s/
TIM LEONARD
United States District Judge

Case No. 93-OK-1633-TL

I certify that a copy of the attached has been mailed to the following:

Dated: January 27, 1997

JAMES R. MANSPEAKER, CLERK

s/
By: Glenna Drake
Deputy Clerk

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

[FILED JANUARY 27, 1997]

Civil Action No. 93-OK-1633-TL

RICHARD ACKERMAN, TIMOTHY BOOKER, ERICH BUTLER, MICHAEL DICKSON, EDWARD DONAHOE, MICHAEL FABIAN, STEVEN JONES, MARK MARES, ROBERTMOON, JAMES MUELLER, DANA ROE, KIM SMITH, PAUL SPIELMAN, ALAN TAMONDONG, BRAD VELLIQUETTE, and JAMES M. FORBES,

Plaintiff(s),

v.

COCA-COLA ENTERPRISES, INC., a Delaware corporation and in good standing and licensed to do business in Colorado,

Defendant(s).

JUDGMENT

Pursuant to the Memorandum Opinion issued this date, judgment is entered against defendant Coca-Cola Enterprises Inc., a Delaware corporation and in good standing and licensed to do business in Colorado and in favor of the following plaintiffs in the following amounts:

Plaintiff	Compensation
Richard Ackerman	$12,792.24
Timothy Booker	37,603.32
Erich Butler	27,468.00
Michael Dickson	40,102.20
Edward Donahoe	66,835.80

Plaintiff	Compensation
Michael Fabian	18,559 45
Steven Jones	43,828.20
Mark Mares	19,423.80
Robert Moon	19,688.60
James Mueller	39,173.40
Dana Roe	86,963.52
Kim Smith	6,132.75
Paul Spielman	27,311.04
Alan Tamondong	9,839.76
Brad Velliquette	22,683.60

Judgment is also entered against plaintiff James M. Forbes and in favor of defendant CocaCola Enterprises Inc., a Delaware corporation and in good standing and licensed to do business in Colorado.

Entered this 27th day of January, 1997.

s/

TIM LEONARD
United States District Judge

Case No. 93-OK-1633-TL

I certify that a copy of the attached has been mailed to the following:

Dated: January 27, 1999

JAMES R. MANSPEAKER, CLERK

s/

By: Glenna Drake
Deputy Clerk

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 93-OK-1633-TL

[FILED JUNE 23, 1997]

RICHARD ACKERMAN, TIMOTHY BOOKER, ERICH BUTLER, MICHAEL DICKSON, EDWARD DONAHOE, MICHAEL FABIAN, STEVEN JONES, MARK MARES, ROBERTMOON, JAMES MUELLER, DANA ROE, KIM SMITH, PAUL SPIELMAN, ALAN TAMONDONG, BRAD VELLIQUETTE, and JAMES M. FORBES,

Plaintiff(s),

v.

COCA-COLA ENTERPRISES, INC., a Delaware corporation and in good standing and licensed to do business in Colorado,

Defendant(s).

ORDER

On January 27, 1997, the court entered judgment in favor of plaintiffs[1] and against defendant on plaintiffs' claim for overtime compensation pursuant to the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201-219. This matter is before the

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1 Judgement was entered in favor of all plaintiffs except James M. Forbes, whose claim was barred by the statute of limitations.

court on the following post-trial motions: (1) Defendant's Motion to Alter or Amend Judgment (2) Plaintiffs' Motion for Prejudgment and Postjudgment Interest; (3) Plaintiffs' Motion to Review Clerk's Taxation of Plaintiffs' Bill of Costs; (4) Plaintiffs' Motion to Compel Production of Billing Records and Disclosure of Billing Rates; and (5) Defendant's Motion for Production of Documents and to Shorten Time for Response.

Motion to Alter or Amend

On February 10, 1997, defendant filed its motion to alter or amend the judgment. As the motion was filed within ten days of the date of the Judgment, it is treated as a motion pursuant to Fed. R. Civ. P. 59(e). Rule 59 provides that "[a] new trial may be granted to all or any of the parties and on all or part of the issues . . . in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States." Fed. R. Civ. P. 59(a). The purpose of a motion to alter or amend "is to correct manifest errors of law or to present newly discovered evidence." Harsco Corp. V. Zlotnicki, 779 F.2d 906, 909 (3d Cir. 1985) (quoted in Committee for the First Amendment v. Campbell, 962 F.2d 1517, 1523 (10th Cir. 1992)).

Defendant contends that the court committed a manifest error of law by declining to apply the "fluctuating workweek" method to compute the overtime compensation due plaintiffs. Defendant argues that the court erroneously relied on case law and definitions that do not apply to the situation at issue here. The court agrees that its reliance on Crenshaw v. Quarles Drilling Corp., 798 F.2d 1345, 1348 (10th Cir. 1986), was in error. Nonetheless, the court finds that defendant has not met its burden of establishing that plaintiffs' overtime compensation

should be calculated using the fluctuating workweek methodology. See Burgess v. Catawba County, 805 F. Supp. 341, 347 (W.D.N.C. 1992) ("since the 'fluctuating workweek' is also an exception to the normal requirements of the FLSA, the Defendant bears the burden of establishing that it complied with the regulations.").

The fluctuating workweek regulation provides that:

> An employee employed on a salary basis may have hours of work which fluctuate from week to week and the salary may be paid him pursuant to an understanding with his employer that he will receive such fixed amount as straight time pay for whatever hours he is called upon to work in a workweek, whether few or many. Where there is a clear mutual understanding of the parties that the fixed salary is compensation (apart from overtime premiums) for the hours worked each workweek, whatever their number, rather than for working 40 hours or some other fixed weekly work period, such salary arrangement is permitted by the Act if the amount of the salary is sufficient to provide compensation to the employee at a rate not less than the applicable minimum wage rate for every hour worked in

> those workweeks in which the number of hours he works is greatest, and if he receives extra compensation, in addition to such salary, for all overtime hours worked at a rate not less than one-half his regular rate of pay.

29 C.F.R. § 778.114(a) (1996). Defendant argues that for the regulation to apply, all that must be shown is that the parties clearly understood that plaintiffs' fixed salary would compensate them for all hours worked. See Defendant's Reply to Plaintiffs' Response to Motion to Alter or Amend Judgment at 2. This reading of the regulation, however, focuses solely on the first sentence and ignores the remainder of the regulation. The regulation expressly provides that two criteria must be met before the fluctuating workweek salary arrangement "is permitted by the Act." First, the amount of salary when divided by the greatest number of hours worked in a workweek must be greater than the applicable minimum wage rate. Second, the salary scheme must provide extra compensation for all overtime hours worked at a rate not less than one-half the regular rate of pay. While defendant has demonstrated compliance with the first requirement,[2] there was no evidence that defendant even attempted to comply with the second criterion. In fact, the evidence was to the contrary. The court finds that defendant has not met its burden of proving that the fluctuating workweek methodology should be utilized in this case. Thus, while

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2 The minimum wage rate for the years in question was $4.25 per hour. 29 U.S.C. § 206(a). Plaintiffs' salaries when divided by the number of hours worked each week exceeded the minimum wage. See Plaintiffs' Exhibit 107.

defendant's motion to alter or amend judgment is granted to the extent the court no longer relies on Crenshaw, it is denied in all other respects.

Motion for Prejudgment and Postjudgment Interest

In this motion, plaintiffs seek an award of prejudgment interest of 8 percent per annum, compounded annually, accruing on the date their overtime payments became due. In addition, plaintiffs seek an award of postjudgment interest at the rate of 5.61 percent from the date of judgment until paid. Defendant does not dispute plaintiffs' entitlement to postjudgment interest, nor does defendant challenge plaintiffs' calculations with respect to the amount of prejudgment interest at issue. Defendant, however, denies that plaintiffs are entitled to recover prejudgment interest and argues that the court's denial of plaintiffs' request for liquidated damages precludes plaintiffs' recovery of prejudgment interest.

Defendant's argument, however, is not persuasive given the state of the law in this circuit. Tenth Circuit precedent clearly provides that a plaintiff may not recover both liquidated damages and prejudgment interest. See Department of Labor v. City of Sapula, 30 F.3d 1285, 1290 (10th Cir. 1994); Doty v. Elias, 733 F.2d 720, 726 (10th Cir. 1984); Blim v. Western Elec. Co., 731 F.2d 1473, 1479-80 (10th Cir. 1984). The cases do not provide that the denial of liquidated damages necessitates the denial of prejudgment interest. In addition, "prejudgment interest is ordinarily awarded in a federal case ...." Malloy v. Monahan, 73 F.3d 1012, 1019 (10th Cir. 1996).

> [A] two step analysis governs the determination of such an award.

> "First, the trial court must determine whether an award of prejudgment interest would serve to compensate the injured party. Second, when an award would serve a compensatory function, the court must still determine whether the equities would preclude the award of prejudgment interest." *U.S. Indus., Inc. v. Touche Ross & Co.*, 854 F.2d 1223, 1257 (10th Cir. 1988) ....

Id.

The court finds that prejudgment interest is warranted in this case to compensate plaintiffs for the delay in receiving the overtime compensation that is due them. See Blim, 731 F.2d at 1479. The equities favor plaintiffs rather than defendant, as defendant has had the use of money that belongs to plaintiffs for, in some instances, more than five years. Failure to grant prejudgment interest to plaintiffs would provide defendant with a windfall while failing to fully compensate plaintiffs. Plaintiffs' Motion for Prejudgment and Postjudgment Interest is therefore GRANTED.

Motion to Review Bill of Costs

On February 6, 1997, plaintiffs submitted their bill of costs, seeking $ 13,516.23 in costs. On February 19, 1997, the Clerk of the Court assessed costs against defendant and in favor of plaintiffs in the amount of $928.35. Basically, the Clerk disallowed the costs associated with depositions that were not

actually used at trial and printing and copying charges.

Rule 54(d) provides that "[e]xcept when express provision therefor is made in a statute of the United States or in these rules, costs other than attorney' s fees shall be allowed as of course to the prevailing party unless the court otherwise directs." Fed. R. Civ. P. 54(d). The Court of Appeals for the Tenth Circuit has held that "Rule 54 creates a presumption that the district court will award costs to the prevailing party." Aerotech. Inc. v. Estes, 110 F.3d 1523, 1526 (10th Cir. 1997). The circumstances under which the court may deny costs to the prevailing party are limited. See id. In addition, the court "must provide a valid reason for not awarding costs to a prevailing party." Cantrell v. IBEW, AFL-CIO, Local 2021, 69 F.3d 456, 459 (10th Cir. 1995) *(en banc).* Generally, the costs of taking and transcribing depositions that are "reasonably necessary to the litigation of the case" are recoverable. Ramos v. Lamm, 713 F.2d 546, 560 (10th Cir. 1983). Depositions that are taken *solely* for discovery, however, are not taxable as costs. Furr v. AT&T Technologies. Inc., 824 F.2d 1537, 1550 (10th Cir. 1987).

Based on the standards enunciated above, the court grants plaintiffs' motion in part and denies it in part. The court hereby awards the costs associated with the depositions at issue. Each of the depositions was "reasonably necessary to the litigation of the case." Without the deposition evidence, the parties would not have been able to stipulate to the representative nature of the witnesses who testified, both for plaintiffs and defendant. Furthermore, plaintiffs' deposition were essential to the parties' stipulation regarding damages. By entering into these stipulations, the parties significantly shortened the trial of this matter. The court finds that these depositions were far more than discovery depositions; therefore, the costs associated with them

should be allowed. The court, however, disallows the $386.31 cost associated with the copying of plaintiffs' depositions for their review prior to trial. The court finds that such cost is not encompassed in "fees for exemplification and copies of papers necessarily obtained for use in the case." 28 U. S . C. § 1920(4). Likewise, the court disallows the $904.45 cost associated with photocopies made at counsel's office. Plaintiffs have presented no evidence that such costs were necessary for presentation of the case; rather, plaintiffs simply state that "this amount of photocopies is extremely reasonable." Motion to Review Clerk's Taxation of Plaintiffs' Bill of Costs at 5. This is insufficient under the statute.

In sum, plaintiffs' motion is granted in part and denied in part. Plaintiffs are hereby awarded costs in the amount of $12 285.47.

Motion to Compel and Motion for Production of Documents

Plaintiffs seek an order compelling defendant to produce the billing records and hourly rates of its attorneys. Plaintiffs argue that such information is relevant to the issue of the attorney's fee to be awarded plaintiffs under the FLSA. Plaintiffs argue that "[t]he billing records of counsel for Defendant would be extremely relevant to the Court to determine whether the amount of hours expended by Plaintiffs' counsel was reasonable in Colorado." Plaintiffs' Motion to Compel Production of Billing Records and Disclosure of Billing Rates at ¶ 3. In addition to plaintiffs' motion to compel, defendant seeks an order compelling plaintiffs to disclose their fee agreement with counsel.

The court finds that neither the billing records nor the hourly rate charged by defendant's attorneys is relevant. The issue before the court is the reasonableness of *plaintiffs'* fee request. To determine that issue, the court must examine the hours expended by plaintiffs' counsel and the prevailing market rate for comparable services. See Beard v. Teska, 31 F.3d 942, 956-57 (10th Cir. 1994). The hours and billing rates charged by defendant's counsel simply have no bearing on that issue. See Malloy v. Monahan, 73 F.3d 1012, 1018-19 (10th Cir. 1996). Likewise, the court finds that plaintiffs' fee agreement with counsel is not relevant to the issue before the court.

Plaintiffs' Motion to Compel Production of Billing Records and Disclosure of Billing Rates is therefore DENIED. The court also DENIES Plaintiffs' Motion for Leave to Conduct Discovery and to Shorten Time for Response and Defendant's Motion for Production of Documents and to Shorten Time for Response.

Conclusion

In sum, Defendant's Motion to Alter or Amend Judgment is DENIED; Plaintiffs' Motion for Prejudgment and Postjudgment Interest is GRANTED; Plaintiffs' Motion to Review Clerk's Taxation of Plaintiffs' Bill of Costs is GRANTED in part and DENIED in part; Plaintiffs' Motion to Compel Production of Billing Records and Disclosure of Billing Rates is DENIED; Plaintiffs' Motion for Leave to Conduct Discovery and to Shorten Time for Response is DENIED; and Defendant's Motion for Production of Documents and to Shorten Time for Response is DENIED.

It is so ordered this 23th day of June, 1997.

s/
TIM LEONARD
United States District Judge

Case No. 93-OK-1633-TL

I certify that a copy of the attached has been mailed to the following:

Dated: June 23, 1997

JAMES R. MANSPEAKER, CLERK

s/
By: Glenna Drake
Deputy Clerk

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 93-OK-1633-TL

[FILED JUNE 23, 1997]

RICHARD ACKERMAN, TIMOTHY BOOKER, ERICH BUTLER, MICHAEL DICKSON, EDWARD DONAHOE, MICHAEL FABIAN, STEVEN JONES, MARK MARES, ROBERTMOON, JAMES MUELLER, DANA ROE, KIM SMITH, PAUL SPIELMAN, ALAN TAMONDONG, BRAD VELLIQUETTE, and JAMES M. FORBES,

Plaintiff(s),

v.

COCA-COLA ENTERPRISES, INC., a Delaware corporation and in good standing and licensed to do business in Colorado,

Defendant(s).

AMENDED JUDGMENT

Pursuant to the Memorandum Opinion issued January 27, 1997, and the Order issued June 23, 1997, judgment is entered against defendant Coca-Cola Enterprises, Inc., a Delaware corporation and in good standing and licensed to do business in Colorado, and in favor of the following plaintiffs in the following amounts, together with interest thereon at the rate of 5.61 percent per annum from January 27, 1997, until paid:

Richard Ackerman, compensation in the amount of $12,792.24 plus prejudgment interest in the amount of $5,381.78, for a total judgment of $18,174.02;

Timothy Booker, compensation in the amount of $37,603.32 plus prejudgment interest in the amount of $16,000.55, for a total judgment of $53,603.87;

Erich Butler, compensation in the amount of $27,468.00 plus prejudgment interest in the amount of $9,479.68, for a total judgment of $36,947.68;

Michael Dickson, compensation in the amount of $40,102.20 plus prejudgment interest in the amount of $14,839.18, for a total judgment of $54,941.38;

Edward Donahoe, compensation in the amount of $66,835.80 plus prejudgment interest in the amount of $27,047.39, for a total judgment of $93,883.19;

Michael Fabian, compensation in the amount of $18,559.45 plus prejudgment interest in the amount of $8,934.95, for a total judgment of $27,494.40;

Steven Jones, compensation in the amount of $43,828.20 plus prejudgment interest in the amount of $15,967.10, for a total judgment of

$59,795.30;

Mark Mares, compensation in the amount of $19,423.80 plus prejudgment interest in the amount of $8,050.79, for a total judgment of $27,474.59;

Robert Moon, compensation in the amount of $19,688.60 plus prejudgment interest in the amount of $9,759.29, for a total judgment of $29,447.89;

James Mueller, compensation in the amount of $39,173.40 plus prejudgment interest in the amount of $14,656.00, for a total judgment of $53,829.40;

Dana Roe, compensation in the amount of $86,963.52 plus prejudgment interest in the amount of $35,943.22, for a total judgment of $122,906.74;

Kim Smith, compensation in the amount of $6,132.75 plus prejudgment interest in the amount of $2,354.30, for a total judgment of $8,487.05;

Paul Spielman, compensation in the amount of $27,311.04 plus prejudgment interest in the amount of $8,861.90, for a total judgment of $36,172.94;

Alan Tamondong, compensation in the amount of $9,839.76 plus prejudgment interest in the amount of $4,271.75, for a total judgment of $14,111.51; and

Brad Velliquette, compensation in the amount of $22,683.60 plus prejudgment interest in the amount of $7,746.53, for a total judgment of $30,430.13.

It is

FURTHER ORDERED that judgment is entered for the defendant, Coca-Cola Enterprises, Inc., a Delaware corporation and in good standing and licensed to do business in Colorado, and against the plaintiff, James M. Forbes. It is

FURTHER ORDERED that plaintiffs shall have their costs in the amount of $12,285.47.

Dated: June 23, 1997

JAMES R. MANSPEAKER, CLERK

By s/_____
Stephen P. Ehrlich
Chief Deputy Clerk

Case No. 93-OK-1633-TL

I certify that a copy of the attached has been mailed to the following:

Dated: June 23, 1997

JAMES R. MANSPEAKER. CLERK

s/

By: Glenna Drake
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APPENDIX C

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

RICHARD ACKERMAN, TIMOTHY BOOKER, ERICH BUTLER, MICHAEL DICKSON, EDWARD DONAHOE, MICHAEL FABIAN, STEVEN JONES, MARK MARES, ROBERT MOON, JAMES MUELLER, DANA ROE, KIM SMITH, PAUL SPIELMAN, ALAN TAMONDONG, AND BRAD VELLIQUETTE,

Plaintiffs - Appellees/CrossAppellants,

v.

COCA-COLA ENTERPRISES, INC., a Delaware Corporation in good standing and licensed to do business in Colorado,

Defendant-Appellant/CrossAppellee.

Nos. 97-1079, 97-1102

ORDER
Filed August 3, 1999

Before **ANDERSON, EBEL**, and **HENRY**, Circuit Judges.

This matter is before the court on the Appellees' motion for reconsideration. The Appellees' Motion for Reconsideration, construed as a petition for panel rehearing pursuant to Fed.R.App. P. 40, is denied. As noted by Appellants, the motion is untimely. In any event, the arguments advanced by the Appellees have been fully considered by the panel.

Entered for the Court
PATRICK FISHER, Clerk of the Court

by: s/
Deputy Clerk

Supreme Court, U.S.
FILED
DEC 22 1999
OFFICE OF THE CLERK

No. 99-864

In The

Supreme Court of the United States

RICHARD ACKERMAN, TIMOTHY BOOKER, ERICH BUTLER, MICHAEL DICKSON, EDWARD DONAHOE, MICHAEL FABIAN, STEVEN JONES, RICHARD LOOS, MARK MARES, ROBERT MOON, JAMES MUELLER, DANA ROE, KIM SMITH, PAUL SPIELMAN, ALAN TAMONDONG, and BRAD VELLIQUETTE,

Petitioners,

v.

COCA-COLA ENTERPRISES INC., a Delaware corporation in good standing and licensed to do business in Colorado,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Respondent disagrees with the *Questions Presented for Review* by the Petitioners. Respondent presents the proper Question for Review, based upon Petitioners' petition for a writ of certiorari, as follows:

> Whether the Tenth Circuit Court of Appeals correctly determined that certain duties performed by Petitioners were performed incidental to and in conjunction with their own sales, for purposes of the outside salesman exemption to the Fair Labor Standards Act. *See* 29 U.S.C. § 213(a)(1); 29 C.F.R. § 541.5; 29 C.F.R. § 541.500, et seq.

LIST OF PARTIES TO THE PROCEEDING

Respondent has no parent companies. Pursuant to Supreme Court Rule 29.6, Respondent states that the following are the non-wholly owned subsidiaries and cooperatives of Respondent:

Coca-Cola Bottling Company of Johnson City
RE Services Holding Company, L.P.
Coca-Cola Enterprises (France)
Immo Dynamica (Belgium)
Immo Willems (Belgium)
Western Container Corporation
Southwest Canners, Inc.
Southeastern Container, Inc.
Gulf States Canners, Inc.

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STATEMENT OF JURISDICTION

The order and opinion of the Tenth Circuit Court of Appeals overruling the United States District Court for the District of Colorado was entered on June 10, 1999. *Ackerman v. Coca-Cola Enterprises Inc.*, 179 F.3d 1260 (10th Cir. 1999). Petitioners originally filed their petition for a writ of certiorari on September 8, 1999, although it was rejected as procedurally deficient. Petitioners refiled their petition and it was docketed on November 22, 1999.

Respondent acknowledges that if the case below otherwise presented a proper case for certiorari, jurisdiction would be proper under 28 U.S.C. §1254(1); but Respondent denies that Petitioner presents a proper case for certiorari.

STATEMENT OF THE CASE

Petitioners were employees of Respondent, and admit that they were primarily engaged for the purpose of making sales. The only question decided by the Court of Appeals was whether Petitioners were performing work "incidental to and in conjunction" with their sales, within the meaning of the laws defining the "outside salesman" exemption to the minimum wage and overtime provisions of the Fair Labor Standards Act ("FLSA"), when they performed "merchandising" duties. The Court of Appeals held that they were, and that Petitioners were therefore exempt. Petitioners do not directly challenge any of the factual assertions made by the Court of Appeals. For purposes of consideration of the petition for a writ of certiorari, Respondent will likewise accept the

factual and procedural assertions made by the Court of Appeals.

ERRORS IN PETITIONERS' STATEMENT OF THE CASE

Respondent agrees that the majority of the material facts in this case are undisputed: primarily, that "Petitioners were employed by the Respondent as salesmen. They were hired to perform sales activities." (Petitioners' Brief p. 10). The parties agree that Petitioners were employed for the purpose of selling Respondent's products and that they were regularly and customarily engaged in that activity away from Respondent's offices. (Petitioners' Appendix A, Court of Appeals Opinion p. 8).

Petitioners' statement that "Respondent stipulated at trial that petitioners engaged in non-exempt work in excess of twenty percent (20%) of petitioners' work week" is incorrect. (Petitioners' Brief p. 10). This statement does not reflect the actual stipulation entered by the parties. It was never stipulated that the work in question was non-exempt: the stipulation was that *in certain work weeks* the Petitioners would spend in excess of 20% of the time spent by non-exempt merchandisers performing merchandising tasks. (Petitioners' Appendix B, District Court Opinion p. 6). In other words, that in some weeks they performed work that, when performed by *other* employees, was non-exempt. The purpose of the stipulation was to set forth the work in question and thereby focus the inquiry on whether these tasks, *when performed by Petitioners,* were or were not exempt.

Petitioners' statement that "it was undisputed at trial that the Petitioners spent up to sixty-five percent (65%) of their time performing non-exempt work" is similarly incorrect. (Petitioners' Brief p. 10). Again, the issue is *whether* the work in question is or is not exempt, as being incidental to and in conjunction with sales when performed by Petitioners. At trial, the three Petitioners who testified as representative of all the Petitioners each testified that their direct sales activities comprised the majority of their work time. (*See* Petitioners' Appendix B, District Court Opinion p. 9, fn. 5). The remaining Petitioners had asserted that they spent varying amounts of time in merchandising versus direct sales activities, but only one of them asserted he could spend as much as 65% of the time merchandising. (Petitioners' Appendix B, District Court Opinion p. 9, fn. 5). The Court should thus reject Petitioners' oft repeated – and untrue – factual assertion that Petitioners spent "up to 65% percent" of their time in "non-exempt" work.

Petitioners' argument that the Court of Appeals' opinion could allow an employer to require an employee to perform "non-exempt work" up to ninety-nine percent of the time and still claim the outside salesman exemption is senseless. Under the law, a person who is not "employed for the purpose of" and who is not "customarily and regularly engaged . . . in . . . making sales" will never be an outside salesman, even if they make an occasional sale. Petitioners' overstatement highlights the weakness of their argument based on the facts of this case: Petitioners admit that they were regularly and customarily engaged in outside sales and that making sales was in fact their primary purpose, and agree that their

performance of merchandising activities increased sales. (*See* Petitioners' Appendix A, Court of Appeals' Opinion pp. 16 to 17; Petitioners' Appendix B, District Court Opinion p. 9). What more "plain and unmistakable evidence" that the merchandising duties in question are incidental to and in conjunction with their sales could there be?

FACTUAL ERRORS IN PETITIONERS' ARGUMENT

Respondent must address yet another error presented as "fact" by Petitioners. They repeatedly assert that the district court found they would spend "over forty-six hours a week" performing duties which were also performed by non-exempt employees. (Petitioners' Brief pp. 13, 15, 16). This is a misstatement: although the district court found that Petitioners' hours ranged from "an average low of fifty-five hours per week to an average high of seventy-two hours per week," (Petitioners' Appendix B, District Court Opinion p. 6, fn. 4), there was no finding that they performed merchandising duties "over forty-six hours" a week. Rather, the district court's actual finding was that they performed such duties anywhere from twelve hours to a potential high of forty-one hours in a given week, depending. (Petitioners' Appendix B, District Court Opinion pp. 9 to 10, fn. 5). In support of their request for a writ of certiorari, Petitioners simply keep repeating their erroneous statement of the district court's factual findings. Petitioners' tactics, however, should not be rewarded.

SUMMARY OF THE ARGUMENT

Petitioners do not present a sufficient ground to grant a writ of certiorari, because Petitioners assert no more than an alleged misapplication of a properly stated rule of law to the facts. The Court of Appeals properly held that Petitioners, who admit that they were engaged for the purpose of making sales and that their primary duty was sales, performed merchandising duties incidental to and in conjunction with their primary duty and were therefore exempt as outside salesmen. The Court of Appeals' interpretation of the regulations and guidance of the United States Department of Labor, which is specifically charged with defining the exemption, was well considered and not inconsistent with any other judicial ruling. Petitioners were exempt from the overtime requirements of the FLSA.

ARGUMENT: REASONS FOR DENYING THE WRIT

A. Petitioners do not present a sufficient ground for the United States Supreme Court to grant a writ of certiorari; Petitioners assert no more than an alleged misapplication of a properly stated rule of law.

Petitioners cite no conflict between the decision of the Tenth Circuit Court of Appeals in this matter and the decision of another United States court of appeals or a state court of last resort. Nor do Petitioners cite an important question of federal law that has not been, but should be, settled by this Court, or that has been decided in a way that conflicts with relevant decisions of this Court:

resolution of the issue of whether merchandising tasks are incidental to and in conjunction with sales when performed by an individual who admits that he or she is primarily employed for the purpose of making sales, and who admits that performing merchandising tasks furthers those goals, is not a question which should be settled by the United States Supreme Court, especially in the absence of any conflict among the United States courts of appeals on the issue.

Petitioners do not challenge the validity of the regulations of the Secretary of Labor. Nor do they challenge the fact that the Court of Appeals relied on the regulations and guidance of the Secretary of Labor. Rather, they assert that the Court of Appeals' application of the regulations and guidance created an unsatisfactory result. However, alleging a misapplication of a properly stated rule of law is rarely a sufficient ground for the granting of a writ of certiorari. *Supreme Court Rule 10.* In the present case, there are no compelling reasons for the Court to grant a writ of certiorari.

B. The Court of Appeals properly held that Petitioners, who admit that they were engaged for the purpose of making sales and that their primary duty was sales, performed merchandising duties incidental to and in conjunction with their primary duty.

The Secretary of Labor is specifically charged with the duty to "define and delimit" the term "outside salesman" in the FLSA. 29 U.S.C. §213(a)(1). The regulations promulgated by the Secretary of Labor are therefore to be given a high level of deference by the courts. *Chevron*

U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984); *Reich v. Parker Fire Protection Dist.*, 992 F.2d 1023, 1026 (10th Cir. 1993). They "are entitled to judicial deference and are the primary source of guidance for determining the scope of exemptions to the FLSA." *Spradling v. City of Tulsa*, 95 F.3d 1492, 1495 (10th Cir. 1996). Similarly, the Secretary of Labor's interpretive guidelines interpret and explain the regulations. Because they are well considered and the reasoning is sound and consistent, the interpretive guidelines are persuasive on issues regarding the FLSA. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944); *Parker Fire Protection Dist.*, 992 F.2d at 1026. Therefore, the Court of Appeals was correct in deferring to the Secretary of Labor's regulations and guidance on the outside salesman exemption.

The only issue decided by the Court of Appeals was whether "merchandising" tasks, when performed by Petitioners, were "incidental to and in conjunction with" their sales of Coca-Cola products. (Petitioners' Appendix A, Court of Appeals' Opinion p. 10). If they were, then the 20% limitation on "non-exempt" work which is part of the criteria for the outside salesman exemption to the minimum wage and overtime requirements of the FLSA was not exceeded, and Petitioners were exempt. If they were not, then the limitation was exceeded and Petitioners were not exempt outside salesmen. 29 C.F.R. §541.5. The Court of Appeals concluded that, based upon the implementing regulations and interpretive guidance of the Secretary of Labor, Petitioners performed merchandising duties incidental to and in conjunction with their own outside sales, and therefore satisfied the outside salesman exemption.

Petitioners cannot point to a single instance where the Court of Appeals diverged from or failed to apply the plain meaning of the regulations in rendering its opinion. Petitioners do not cite a single authority which supports their position that the Court of Appeals' opinion is inconsistent with the intent of the FLSA and the implementing regulations. Petitioners do not challenge the validity of the regulations themselves. Rather, they essentially argue that the regulations, when applied by the Court of Appeals to their case, created an unsatisfactory result.

Petitioners argue that the Court of Appeals "focused exclusively on whether the 'salesman' executed the sale and ignored his overall job responsibilities." (Petitioners' Brief p. 14). They argue that its perceived "emphasis on taking the order" is not proper. (Petitioners' Brief p. 15). Quite the contrary: the Court of Appeals focused on the undisputed fact that Petitioners were primarily employed for the purpose of making sales. In determining whether merchandising duties were incidental to and in conjunction with this purpose, the Court of Appeals properly looked to the regulations of the Secretary of Labor, which specifically contemplate that such duties, when performed by the individual who actually makes the sale, are exempt activities. 29 C.F.R. §541.504, §541.505. The Court of Appeals' determination was consistent with prior interpretations of the outside salesman exemption, which have noted that time spent in a particular task does not determine whether that task is incidental to and in conjunction with sales for purposes of the exemption. *See, e.g., Resnick v. M & R Baking Co.*, 1970 WL 2793, *1 (E.D. N.Y., Aug. 6, 1970) ("inquiry into the quantum of non-sales activity [cannot] help where, as here, it is incidental

to and in conjunction with the plaintiff's own outside sales and solicitations.") (opinion included at "Appendix").

Petitioners argue that, because merchandising duties are non-exempt when performed by merchandisers but are exempt when performed by Petitioners, the result is "anomalous." (Petitioners' Brief p. 15). Yet the regulations clearly contemplate that "promotional" duties (which are analogous to "merchandising" in almost all respects) can be and often are performed by both exempt and non-exempt employees. Section 541.504 of the regulations is, in fact, a lengthy discussion which attempts to distinguish "promotion work" performed by an individual who then attempts to or does consummate a sale, from the same work performed by an individual who does not himself make a sale. *See, e.g.,* 29 C.F.R. §541.504(a). In the former case, but not the latter, the work is exempt. *See generally Hodgson v. Krispy Kreme Doughnut Co.,* 346 F. Supp. 1102 (M.D. N.C. 1972) (acknowledging that "merchandising" duties were integral to customer satisfaction and goodwill and, consequently, to increasing plaintiffs' sales). Petitioners' sole argument for overturning the decision below – that the result reached by the Court of Appeals is contrary to the intent of the FLSA and the Secretary of Labor's regulations – is defeated by the plain, unambiguous language of the regulations themselves, and must be disregarded.

Petitioners desire the Court to accept the dictionary definition of "incidental," thereby disregarding the definition created by the Secretary of Labor in the specific context of the outside salesman exemption. Making sales was Petitioners' primary duty: they traveled to more than

25 to 35 stores on a given day, making a sale at each one and trying to increase the volume of Coca-Cola product in the store. They testified that the reason they performed merchandising tasks was for the purpose of enhancing sales. The Secretary of Labor unequivocally accepts that such duties, when performed by the person who makes the sale, are "incidental to and in conjunction with" the sale. The Court of Appeals' interpretation of the regulations as applied to the facts of this case were consistent with the FLSA and the purposes for which it was enacted.

C. The Court of Appeals' interpretation of the regulations and guidance of the Secretary of Labor was correct. Petitioners cite no precedent nor offer an acceptable analysis for finding the Court of Appeals' legal holdings in error.

Petitioners do not argue that the Court of Appeals applied the wrong facts. They do not argue that the holding of the Court of Appeals is in conflict with any prior opinion of that court or any other federal court or state court of last resort. They do not argue that the applicable regulations and interpretive guidance of the Secretary of Labor are arbitrary and capricious, nor did they do so at the trial or appellate stage of the proceedings. Rather, they challenge the Court of Appeals' application of the Secretary's rules, arguing that their application "renders" the regulations arbitrary and capricious. However, Petitioners' argument rests entirely on fallacious reasoning.

Their primary objection to the Court of Appeals' opinion is that, under its reasoning, "Respondent could

give each of its employees a sales pad, call them outside salesmen, and ask them to stop by their local 7-11 on their way home to pick up an order," and thus claim these employees to be exempt. (Petitioners' Brief 18-19). This argument is ridiculous. It misinterprets both the analysis of the Court of Appeals and the effect of its holding. The essential fact of this case, and of the holding of the Court of Appeals, is that there is and was absolutely no dispute that Petitioners were hired for the purpose of making sales, that their primary duty was sales, and that they were regularly and customarily employed away from Respondent's place of business in making sales. While the theoretical scenario created by Petitioners clearly presents a valid question as to whether the fictitious employees would be "employed for the purpose of and . . . customarily and regularly employed away from his employer's place or places of business in . . . making sales . . . ," there was never any such question before the Court of Appeals in the present case. (Petitioners' Appendix A, Court of Appeals' Opinion pp. 8, 10).

The holding of the Court of Appeals began with the undisputed fact that Petitioners' primary duty was sales, and then properly moved on to the only question at issue: whether merchandising tasks were "incidental to and in conjunction with" their sales. Far from rendering the outside salesman exemption "meaningless," (Petitioners' Brief p. 16), the Court of Appeals' interpretation is decided upon careful consideration of the applicable law; specifically, the regulations and guidance created by the Secretary of Labor, at 29 C.F.R. §541.5 and 29 C.F.R. §541.500, et seq.

Petitioners argue that the outside salesman exemption was not intended to allow employers to "manipulate" the distinction between exempt and non-exempt employees. However, there was no finding of intent by either the district court or the Court of Appeals, and to the extent this alleged factor was not a basis for any finding in the case below, it is irrelevant. Again, Petitioners attempt to create a theoretical scenario which not only does not exist, but *cannot* exist.

The "important federal question" which Petitioners attempt to create does not exist. Unless an employee meets the "primary duty" test of the outside salesman exemption, the other issues encompassed in the definition of outside salesman never arise. The Court of Appeals never absolved an employer from proving the "primary duty" element of the exemption, and it was in fact a pivotal basis for its decision. The Court of Appeals applied the plain language of the applicable laws, regulations and guidance, and Petitioners can point to no contrary precedent or reason to overrule the application. Their entire argument is a red herring. As it is the sole basis for their claim that the Court of Appeals' application of the correct law to the correct facts somehow *results* in the regulations being "arbitrary and capricious," the argument should not be considered.

D. Respondent met its burden of proof of demonstrating that Petitioners were exempt from the overtime requirements of the Fair Labor Standards Act.

The testimony of the three Petitioners who testified at trial was stipulated as being representative. Petitioners

make the bald assertion that Respondent failed to meet its burden of proof on the outside salesman exemption. Their argument is, more precisely, that Respondent "did not refute by 'clear and unmistakable evidence,' the fact that employees in this suit spent up to 65% of their time performing non-sales functions for Respondent." (Petitioners' Brief p. 20). This is an erroneous statement of the burden of proof.

All of the elements of the outside salesman exemption, with the sole exception of the "20% non-exempt work" element, were undisputed. The regulations state that duties which are "incidental to and in conjunction with" sales are non-exempt. There is no requirement that an employer show that 65% of an outside salesman's time is not "non-sales," but only that the employee in question does not spend more than 20% of his or her time in non-exempt duties. The focus is not whether the duties are "non-sales," but whether the duties are exempt. Respondent's burden, therefore, was solely to show that merchandising duties performed by Petitioners were incidental to and in conjunction with their sales. The Secretary of Labor finds "merchandising" tasks to be incidental to and in conjunction with sales when performed by an individual who sells. The Court of Appeals engaged in a thoughtful and thorough consideration of those rules, and concluded that Respondent had met its burden of proof. The Court of Appeals reached the correct decision.

CONCLUSION

Petitioners' proposition that the result reached through the application of the correct law to the correct facts rendered the wrong result is insufficient grounds for the grant of a writ of certiorari. There is no conflict between the decision of the Court of Appeals and that of any other United States court of appeals, any state court of last resort, or this Court. There is no important question of federal law that this Court should decide, and the petition should be denied.

The Court of Appeals applied the correct law and facts and reached a decision wholly consistent with and supported by the Secretary of Labor's regulations and guidance. Respondent respectfully requests this Court to deny Petitioners' petition for a writ of certiorari, to dismiss the action, and to award Respondent costs and expenses.

Respectfully submitted,

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19 Wage & Hour Cas. (BNA) 811, 63 Lab.Cas. P 32,370
(Cite as: 1970 WL 2793 (E.D.N.Y.))

Bernard Resnick, Plaintiff

M & R Baking Company, Inc., Defendant.

No. 60-C-769

United States District Court, E.D. New York

August 6, 1970

DOOLING, D.J.

#1 Plaintiff, who in the period in question, was a baked goods routeman employed by defendant, sues for overtime pay under the Fair Labor Standards Act, 29 U.S.C. § 207. Defendant moves for summary judgment on the stipulated facts and plaintiff's deposition testimony on the ground that plaintiff was not covered by the Act because he was, within the meaning of the Act, 29 U.S.C. § 213(a)(1), an "employee employed . . . in the capacity of outside salesman (as such terms are defined and delimited . . . by regulations of the secretary . . .)." The directly relevant regulations of the Secretary appear at 29 C.F.R. §§ 541.5, 541.500, 541.505 (particularly at (b) seventh sentence), and 541.506.

The stipulated facts, deposition of plaintiff and the exhibits (including the labor contract) make out a very strong showing that plaintiff, as a driver salesman, came within the exemptive language of Section 541.505(b):

> "Thus, there is little question that a routeman who provides the only sales contact between the employer and the customers, who calls on customers and takes orders for products which he delivers from stock in his vehicle or procures and delivers to the customer on a later trip, and

> who receives compensation commensurate with the volume of products sold, is employed for the purpose of making sales."

Plaintiff has wholly failed to meet the showing so put forward. To argue that plaintiff was simply a delivery man regularly distributing products to established customers in fixed contractual or other pre-established amounts (like the city milkman) is to ignore the entire background of fact and the manifest care and discrimination with which the regulations have defined the exempt and non-exempt classes of driver salesmen. See Section 541.505 particularly subdivisions (b), (f); Wirtz v. Golden Cream Do-Nut Co., D.C.Colo.1968, 58 LC ¶ 32,098. Overwhelming here is the interpretative significance of the entire agreement over the years among employer, employees and Union that defendant's routemen are in the exempt class. Nor can inquiry into the quantum of non-sales activity help where, as here, it is incidental to and in conjunction with the plaintiff's "own outside sales and solicitations." See Sections 541.5(b), 541.500(b), 541.505(c) (first and last two sentences), 541.506.

Accordingly it is Ordered that defendant's motion for summary judgment is granted and the Clerk is directed to enter judgment that plaintiff take nothing and that the action is dismissed on the merits with costs as taxed by the Clerk.